Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

MICHAEL LENNON, *et al.*,

Petitioners,

vs.

JULIA ALEXANDER, AS EXECUTOR OF THE ESTATE OF HENRY O. QUADE, JR., DECEASED,

Respondent.

Petition For Writ Of Certiorari To The United States District Court For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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116 pp

QUESTIONS PRESENTED

1. Are police officers liable under 42 U.S.C. § 1983 for shooting a person in self-defense, where the liability is premised solely on a claim that the police "created the situation" in which the person tried to shoot them?

2. For purposes of qualified immunity, is the law clearly established that police officers may be liable for shooting a person in self-defense, where liability is premised upon police actions taken before the shooting and where every prior appellate decision to consider such liability has rejected it?

3. Where police officers are in the course of executing a forcible entry warrant, does the Fourth Amendment require the officers to stop and obtain an arrest warrant once the officers have determined to arrest the occupant because he threatened to shoot them?

4. For purposes of qualified immunity, is the law clearly established that police officers may not enter a house to arrest its occupant without an arrest warrant, where the occupant threatened to shoot the officers as they prepared to execute a forcible entry warrant?

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Petition For Writ Of Certiorari To The United States District Court For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners Michael Lennon, John Willett and Timothy Hettrich, senior officers of the San Francisco Police Department ("the Officers"), respectfully pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding.

OPINIONS BELOW

The July 8, 1994 decision of the Court of Appeals is reported at 29 F.3d 1355 (1994), reprinted in Appendix A to this Petition.

On September 3, 1992, the Honorable D. Lowell Jensen of the United States District Court for the Northern District of California issued an order granting the Officers partial summary judgment. That unpublished order is reprinted in Appendix B to this Petition.

On September 11, 1992, the district court issued an order granting the Officers and the City and County of San Francisco full summary judgment. That unpublished order is reprinted in Appendix C to this Petition.

The August 17, 1994 order of the Ninth Circuit denying the Officers' petition for rehearing and rehearing *en banc* is reprinted in Appendix D to this Petition.

JURISDICTION

Respondent Julia Alexander ("Alexander"), executor of the estate of Henry O. Quade, brought this suit against members of the San Francisco Police Department and the City and County of San Francisco ("the City").[1] The complaint sought relief under 42 U.S.C. §§ 1983 and 1985. The district court's jurisdiction was based on 28 U.S.C. §§ 1331 and 1343.

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[1] Alexander also sued other employees of the City. All defendants other than the three petitioning police officers have been dismissed.

On Alexander's appeal, the Ninth Circuit had appellate jurisdiction under 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. Title 42, § 1983 of the United States Code provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . , subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

3. California Code of Civil Procedure § 1822.50 provides as follows:

> An inspection warrant is an order, in writing, in the name of the people, signed by a judge of a court of record, directed to a state or local official, commanding him to conduct any inspection

> required or authorized by state or local law or regulation relating to building, fire, safety, plumbing, electrical, health, labor or zoning.

4. California Code of Civil Procedure § 1822.51 provides in pertinent part as follows:

> An inspection warrant shall be issued upon cause. . . . An inspection warrant shall be supported by an affidavit, particularly describing the place, dwelling, structure, premises, or vehicle to be inspected and the purpose for which the inspection is made.

5. California Code of Civil Procedure § 1822.52 provides in pertinent part as follows:

> Cause shall be deemed to exist if . . . there is reason to believe that a condition of nonconformity exists with respect to the particular place, dwelling, structure, premises or vehicle.

6. California Code of Civil Procedure § 1822.56 provides in pertinent part as follows:

> [T]he judge may expressly authorize a forcible entry . . . where facts are shown establishing that reasonable attempts to serve a previous warrant have been unsuccessful.

7. California Code of Civil Procedure § 1822.57 provides as follows:

> Any person who willfully refuses to permit an inspection lawfully authorized by warrant issued pursuant to this title is guilty of a misdemeanor.

8. California Penal Code § 69 provides as follows:

> Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is [guilty of a felony].

STATEMENT OF THE CASE

Decedent Henry Quade, Jr., resided in San Francisco, California. In June 1990, Quade's neighbors complained to the City's Department of Public Health about a foul odor and apparent sewage seeping from Quade's garage. Clerk's Record ("CR") 65. Following many unsuccessful attempts to contact Quade, on September 13, 1990, a San Francisco public health inspector obtained an administrative inspection warrant. Cal. Code Civ. Pro. § 1822.50 *et seq.*; CR 65.

Quade did not respond to the warrant. On October 3, 1990, the San Francisco Municipal Court issued a second warrant, this one authorizing a forcible entry into Quade's residence. Cal. Code Civ. Pro. § 1822.56; CR 65.

On October 16, inspectors attempted to execute the forcible entry warrant. Two San Francisco Police officers were present to assist. CR 75: Ex. D, p. 37.

Quade had nailed the door shut. San Francisco Police Sergeant Richard Heller moved the cardboard over a broken glass panel next to the door and announced his

presence. Quade answered: "I am going to get my gun and use it." CR 75: Ex. L, pp. 40-43.

Other officers arrived and set up a perimeter around Quade's house. After a negotiation team tried without success to contact Quade, Commander Lennon, in charge of the operation along with Captains Willett and Hettrich, ordered a tactical team to enter Quade's house.

After the officers forced open the door, Quade confronted them with a gun. The officers repeatedly ordered Quade to drop it. He panned the gun back and forth, saying: "I told you I was going to use it." CR 67-69. Still, the officers withheld their fire, "want[ing] to give Mr. Quade every opportunity to give up, to drop that weapon." CR 75, Exh. P, p. 143. Quade then pulled the trigger twice. The officers fired, killing Quade. CR 67-69; CR 75: Ex. R. His gun apparently did not work, and the officers were unharmed.

After the shooting, Captain Hettrich told the press that because Quade had not responded to negotiators, "we [decided] to try to go in and arrest him." 29 F.3d at 1359. Later, the health inspectors entered the house, finding garbage throughout and sewage flooding the garage and leaking onto the sidewalk. CR 75: Ex. A and H.

On May 3, 1991, Alexander filed her complaint. The complaint included claims for "the warrantless attempt to arrest" Quade, and for "the use of unreasonable, and excessive and deadly force in attempting said arrest." CR 1.

On September 2, 1992, the district court heard the parties' motions and cross-motions for summary judgment. As to the claim of excessive force, Alexander conceded that the officers shot Quade in self-defense, but argued that the commanders were liable because they "created the need to use deadly force." Reporter's Transcript, p. 20 (9/2/92). The district court granted the Officers summary judgment on the claims of unlawful arrest and unlawful entry, and later granted the Officers qualified immunity on Alexander's claim of excessive force. *See* App. B, p. B-20, App. C, pp. C-6 and C-9. The court also rejected the claim of municipal liability.

A divided panel of the Ninth Circuit reversed the granting of summary judgment to the Officers on the claims of unlawful entry and excessive force. As to the entry, Judge Fletcher's majority opinion found a factual dispute over the Officers' purpose in ordering the entry into Quade's house, and held that if their primary purpose was to arrest Quade, the entry would be illegal because the forcible entry warrant did not authorize an arrest. 29 F.3d at 1360. The majority also held that the law on this issue was clearly established, and thus, that the Officers were not entitled to qualified immunity. *Id.* at 1364.[2]

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[2] Having decided that the entry was unlawful, the Ninth Circuit did not overturn the district court's ruling that the police did not unlawfully arrest Quade by surrounding his house. 29 F.3d at 1364. Neither that ruling nor the Ninth Circuit's affirmance of the district court's ruling on municipal liability, *id.* at 1367, is at issue here.

In addition, the majority held that the Officers could be liable under the Fourth Amendment for "creating the situation which caused Quade to take the action he did." 29 F.3d at 1366-67. Without analyzing whether the applicable law was clearly established, the majority reversed the district court's grant of qualified immunity to the Officers on the claim of excessive force. *Id.* at 1367. Judge Kozinski concurred separately, and Judge Trott dissented.

REASONS FOR GRANTING THE WRIT

Judge Trott's dissent states the case for certiorari:

> [T]he holdings of this case are at war with (1) Supreme Court and circuit precedents, (2) the Fourth Amendment's standard of reasonableness, (3) the law of qualified immunity, and (4) our responsibility as judges to maintain a body of law upon which executive branch members can rely in doing their work.

29 F.3d at 1378 (Trott, J., diss.).

In particular, the ruling on excessive force is an extremely dangerous one. Contrary to seven other Courts of Appeals, the Ninth Circuit holds that police officers can be liable for using excessive force where it is undisputed that they acted in self-defense, but where their actions leading up to the shooting "created the situation" that led the suspect to attack them. By constitutionalizing disputes over tactical decisions that lead to a use of force, the ruling opens federal courts to a new class of claims. What is worse, the decision sends a terrible message: Officers deciding whether to answer force with force must risk being damned if they do and dead if they don't.

The majority's other rulings are equally troubling. The panel holds, in effect, that by resorting to threats of unlawful force, a citizen may halt the immediate execution of an inspection warrant, even when the warrant embodies a judicial recognition that resistance is likely and force may be used. This holding "literally wreaks havoc on the Fourth Amendment and the law covering forcible inspection warrants." 29 F.3d at 1369 (Trott, J., diss.).

Finally, the majority upends the doctrine of qualified immunity. That doctrine is meant to shield government officials from facing trials for discretionary decisions, so their ability to act decisively will not be impaired, except where the law clearly forbids the act they are contemplating. The decision below removes that shield by allowing executive officers to be tried for decisions whose legality sharply divides federal judges. Certiorari is needed.

A. Certiorari Should Be Granted On The Ninth Circuit's Decision That Police Officers May Be Liable On A Claim Of Excessive Force For "Creating The Situation" In Which A Suspect Attacks Them.

The majority's holding that Alexander's claim for excessive force states "a classic Fourth Amendment violation," 29 F.3d at 1366, conflicts with the decisions of this Court and of seven other Courts of Appeals.

1. The Ninth Circuit's Decision Conflicts With The Decisions Of Seven Other Circuits.

A claim of excessive force arises under the Fourth Amendment's prohibition on unreasonable seizures. *Graham v. Connor*, 490 U.S. 386, 395 (1989); *Brower v. County of Inyo*, 489 U.S. 593, 599 (1989). A seizure occurs when a person yields to a show of authority from the police, or when the police touch the person. *California v. Hodari D.*, 499 U.S. 621, 626 (1991). In this case, Quade did not yield. Thus, the seizure did not occur until the police actually shot him.

The other circuits facing similar claims are *unanimous*: When a suspect attacks police officers, they are not liable under § 1983 for actions they may have taken leading up to their use of force in self-defense.

In *Carter v. Buscher*, 973 F.2d 1328 (7th Cir. 1992), for example, the court rejected such a claim. There, the police devised an intricate plan to arrest a suspect. The plan aborted, the suspect drew a gun, and the police killed him. His administrator sued under § 1983, alleging that "by reason of their ill-conceived plan," the police "provoked a situation whereby unreasonable deadly force was used." *Id.* at 1330.

Relying on *Hodari D.*, the Seventh Circuit held that "*pre-seizure conduct is not subject to Fourth Amendment scrutiny,*" and that absent a yielding to police authority, a seizure occurs only when actual force is applied. *Id.* at 1332, 1333 (emphasis added). Thus, the court concluded: "*Shooting [the subject], then, constitutes the only 'seizure' we must scrutinize under the Fourth Amendment.*" *Id.* at 1333 (emphasis added). This holding is directly contrary to the

majority's decision here: *"The excessive force claim turns on the force the officers used in entering the house, not the force they used or didn't use once they had entered."* 29 F.3d at 1366 n.12 (emphasis added).

Similarly, in *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993), the court applied *Hodari D.* in favor of police officers alleged to have used excessive force during a dangerous highway chase.

The suspect was ultimately killed. His wife brought suit, alleging that the police had used excessive force during the chase by attempting to block the suspect's moving truck. The court rejected the claim, finding that no seizure occurred until the driver was actually shot:

> The Fourth Amendment prohibits unreasonable *seizures*, not unreasonable or ill-advised conduct in general. Consequently, *we scrutinize only the seizure itself, not the events leading to the seizure*, for reasonableness under the Fourth Amendment.

Id. at 1333 (emphasis added, citations omitted).

Likewise, in *Young v. City of Killeen*, 775 F.2d 1349, 1353 (5th Cir. 1985), the court dismissed an allegation of excessive force based upon an officer's "negligence *in creating a situation*" where a suspect was shot when the officer mistakenly thought the suspect was reaching for a gun. *See also Fraire v. City of Arlington*, 957 F.2d 1268, 1275 (5th Cir.) (officer not liable on theory that he "manufactured the circumstances that gave rise to the fatal shooting" by failing to identify himself properly while in plainclothes), *cert. denied*, 113 S.Ct. 462 (1992). These cases recognize that police officers facing violent resistance

must be free to defend themselves, even if they erred in getting into the situation.

The Fourth, Sixth, Tenth and Eleventh Circuits are in accord. *See Drewitt v. Pratt*, 999 F.2d 774, 780 (4th Cir. 1993) (granting qualified immunity to officer accused of creating dangerous situation leading to arrest); *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991) (holding irrelevant evidence of officer's allegedly improper actions preceding firing of shot at suspect); *Brandenburg v. Cureton*, 882 F.2d 211, 214 (6th Cir. 1989) ("poor tactical preparation" does not state a claim under § 1983); *Bella v. Chamberlain*, 24 F.3d 1251, 1256 (10th Cir. 1994) (finding no seizure in officers' shooting at suspect's helicopter during chase one hour before suspect's arrest), *pet. for cert. filed*, 63 U.S.L.W. 3295 (U.S. Sept. 19, 1994) (No. 94-527); *Menuel v. City of Atlanta*, 25 F.3d 990, 994-95 (11th Cir. 1994) (deployment of police around suspect's bedroom before shooting was not a seizure). The Ninth Circuit's decision mentions none of these cases.

2. The Ninth Circuit's Decision Conflicts With This Court's Decision In *Graham v. Connor*.

The opinion below purports to rely on this Court's decision in *Graham v. Connor*, 490 U.S. 386 (1989). *See* 29 F.3d at 1366. In fact, the Ninth Circuit turns *Graham* on its head. In *Graham*, the Court held as follows:

> [T]he "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively

> reasonable" in light of the facts and circumstances confronting them, *without regard to their underlying intent or motivation.*

490 U.S. at 397 (emphasis added).

Curiously, the Ninth Circuit cites this passage from *Graham*, but *omits any mention of the critical phrase at the end of the passage.* The majority's opinion states:

> [In *Graham*], the Supreme Court held that a police officer's use of force in apprehending a suspect violates the Fourth Amendment if it is unreasonable in light of the facts and circumstances confronting the officer.

29 F.3d at 1366 (emphasis added, citations omitted). The majority says nothing about the irrelevance under *Graham* of the officer's "underlying intent or motivation."

The omission is significant, because the Ninth Circuit's entire analysis actually *turns on* the underlying intent of the Officers. Following the statement quoted above, the opinion states:

> Summary judgment is inappropriate, since *whether the officers entered for the purpose of arresting Quade or for the purpose of assisting in the execution of the inspection warrant is in contention,* as is the reasonableness of the force. . . . *If* the jury were to find that *the officers entered in order to help the inspectors inspect* – as defendants contend on appeal – then the jury may also conclude that the force used (deployment of a SWAT team) was excessive *in relation to the purpose* for which it was used (ensuring the immediate execution of a forcible entry inspection warrant).

29 F.3d at 1367 (emphasis added). Thus, the Ninth Circuit expressly holds that whether the force was excessive depends upon the Officers' subjective purpose. This decision *directly conflicts* with the holding of *Graham*.

Moreover, the panel's decision reflects no concern for "minimizing the harm to the officers" executing a warrant. *Michigan v. Summers*, 452 U.S. 692, 702-03 (1981); *see Graham v. Connor*, 490 U.S. at 396 (one factor in determining reasonableness is "whether the suspect poses an immediate threat to the safety of the officers or others"). Indeed, the focus on the officers' subjective intent completely ignores their safety: The threat posed by a gunman does not vary according to whether the entering officers intend to inspect, arrest or both.

In addition, by permitting a jury to find excessive force based on the tactical "*deployment* of a SWAT team," 29 F.3d at 1367, the decision inevitably subjects the tactical choices of police commanders to constitutional scrutiny.[3] For example, Judge Fletcher implies that the Officers would not be liable for using excessive force if they had sent a single, non-SWAT-trained officer into the

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[3] The concurring opinion of Judge Kozinski makes such scrutiny *strict*. He suggests that the Officers were required to exhaust "less intrusive alternatives, like using tear gas or waiting Quade out." 29 F.3d at 1368 (Kozinski, J., conc.) "But," Judge Kozinski has more recently written, "as the text of the Fourth Amendment indicates, the appropriate inquiry is whether the officers acted reasonably, not whether they had less intrusive alternatives available to them." *Scott v. Henrich*, No. 91-35429, 1994 U.S. App. LEXIS 30487, at *6 (9th Cir. November 2, 1994); *accord, e.g., Menuel v. City of Atlanta*, 25 F.3d at 996-97.

house. 29 F.3d at 1367. To have done so, of course, might well have jeopardized the safety of that officer.

In sum, the Ninth Circuit's ruling imperils police officers who face resistance in making arrests. The decision elevates to the level of constitutional inquiry each of the myriad judgments made in the chain of events that leads to the use of force. In the words of the Seventh Circuit, the theory adopted below will "create a cottage industry wherein the federal courts would be called upon to second guess police officers as to every discretionary decision regarding time and place of arrest." *Carter v. Buscher*, 973 F.2d 1328, 1331 (7th Cir. 1992).

The pretrial posture of this case does not alter the need to resolve the conflicts here. Should the Court deny certiorari, and should the Officers prevail at trial, this dangerous precedent would stand without a later opportunity for review.

Even if such a later opportunity arose, the interim harm would be great. "Alexander" claims will proliferate, since the opinion here provides a roadmap for getting complaints of excessive force to juries. As a result, law enforcement officers in California and other western states will be forced to trial in cases that should not have survived summary judgment. Certiorari should be granted.

B. The Ninth Circuit's Decision Denying The Officers Qualified Immunity On The Claim Of Excessive Force Ignores This Court's Directive To Identify The Particular Federal Right Violated And To Determine Whether It Was Clearly Established.

This Court's decisions direct lower courts to begin their analysis of qualified immunity claims with two purely *legal* questions: (1) Did government officials violate a "particularized" federal right? (2) If so, was the right clearly established? *See Siegert v. Gilley*, 500 U.S. 226, 232-33 (1991); *Anderson v. Creighton*, 483 U.S. 635, 639-41 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

In this case, the Ninth Circuit's *sole* reference to qualified immunity on the claim of excessive force comes in the following sentence:

> We conclude that the dispute as to the facts precludes summary judgment for defendants both on the merits and on defendants' *qualified immunity* claim.

29 F.3d at 1367 (emphasis added).

Significantly, however, the *only* factual dispute concerns the Officers' intent in entering the house. The majority never asks the *legal* questions that make that dispute immaterial: (1) Does the Constitution secure a right to be free from situations "created" by the police where injury to a person may result from attacking them? (2) If so, was that right clearly established?

Not only was that right not clearly established; it has been *rejected* by every prior federal appellate decision to consider it. *See supra* pp. 10 to 12. This Court itself has made clear that there is no right to be free from deadly

force where "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).

Claims of qualified immunity "should be resolved at the earliest possible stage of litigation." *Anderson*, 483 U.S. at 646 n.6. "The entitlement is an *immunity from suit* . . . and . . . it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis in original). The Ninth Circuit's failure to follow this Court's directives cries out for review.

C. Certiorari Should Be Granted On The Ninth Circuit's Decision That The Officers Entered Quade's House Illegally.

The other substantive Fourth Amendment issue in this case concerns the lawfulness of the entry into Quade's house. Two facts are critical to this Court's review.

First, a judge had issued two inspection warrants, the second based upon a heightened showing. *See* 29 F.3d at 1372 (Trott, J., diss.). The issuing judge actually anticipated resistance, authorizing a *forcible* entry to search Quade's house from top to bottom.[4]

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[4] Alexander has contested neither the validity of the forcible inspection warrant nor the authority of police to assist in its execution. *See People v. Tillery*, 211 Cal.App.3d 1569, 1577, 260 Cal.Rptr. 320, 323 (Cal.App. 5th Dist. 1989) (approving practice of officers serving administrative warrants).

Second, from inside his house, Quade threatened to *shoot* a police officer who was on the scene to protect the health officials executing the warrant. The threat was a crime. Cal. Penal Code § 69. Surely its commission reduced Quade's reasonable expectations of privacy.

Nonetheless, the Ninth Circuit held that police officers must suspend execution of a judicially authorized, forcible entry warrant to seek a criminal warrant where the officers have concluded that an arrest is necessary to execute the warrant they have.[5] The majority made no attempt to balance the Fourth Amendment's protections against the community's interests in public safety and the diligent enforcement of the law. *See, e.g., Graham v. Connor*, 490 U.S. at 396 (excessive force determination requires "a careful balancing of . . . individual's Fourth Amendment interests against the countervailing governmental interests"). Rather, the panel adopted a categorical approach, holding that *Payton v. New York*, 445 U.S. 573 (1980), unequivocally requires police officers to have a criminal warrant when entering a home to make an arrest.

Unlike this case, however, *Payton* did not involve officers whose probable cause was based on personally-witnessed threats of unlawful force from inside the home. In such a situation, the need for a neutral evaluation of probable cause diminishes. As Justice Powell wrote in considering the warrantless arrest of a suspect on a street:

> [An arrest for a crime committed in an officer's presence] presents no danger that an innocent

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[5] The evidence is undisputed that the health inspection proceeded after the tragic events giving rise to this case. CR 75: Ex. A and H.

> person might be ensnared, since the officer observes both the crime and the culprit with his own eyes; there thus would be no reason to require a warrant in that particular situation even if there might be in others.

United States v. Watson, 423 U.S. 411, 426 n.1 (1976) (Powell, J., conc.).

Moreover, in neither *Payton* nor any other case cited by the majority did government officials have a forcible entry warrant. Indeed, in all but one of the cases cited by the majority, the searches were *warrantless*.[6] Here, by contrast, *two* warrants had issued. In these circumstances, "[n]o legitimate Fourth Amendment purpose is served by forcing the police to go back, yet a third time, to get an arrest warrant." 29 F.3d at 1372 (Trott, J., diss.).

D. The Ninth Circuit's Decision Denying The Officers Qualified Immunity On The Claim Of Unlawful Entry Ignores This Court's Directive To Determine Whether The Illegality Of The "Particular" Conduct At Issue Was Clearly Established.

The Ninth Circuit also rejected qualified immunity on Alexander's claim of unlawful entry, finding that

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[6] *See Payton*, 445 U.S. 573; *Michigan v. Clifford*, 464 U.S. 287 (1984) (warrantless search by arson investigators); *Camara v. Municipal Court*, 387 U.S. 523 (1967) (warrantless inspection for building code violations); *Wyman v. James*, 400 U.S. 309 (1971) (warrantless entry by welfare worker); and *United States v. $124,570 U.S. Currency*, 873 F.2d 1240 (9th Cir. 1989) (warrantless search of luggage). In *Abel v. United States*, 362 U.S. 217 (1960), administrative officials did have an inspection warrant, and the Court allowed evidence from that inspection to be used in a criminal prosecution.

"clearly established law require[d] an arrest warrant." 29 F.3d at 1364.

Yet no prior decision "clearly establishes" a right to be free of an entry without an arrest warrant where the occupant of a house has threatened the police as they seek to execute a forcible entry warrant. *See supra* n.6. The panel failed to ask whether the illegality of the *"particular"* conduct was clearly established, so that reasonable officers would have known that they were violating the law. *See Anderson v. Creighton*, 483 U.S. at 639-40.

Indeed, the "decisive fact" in a claim of qualified immunity is whether "officers of reasonable competence could disagree on the issue." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). In this case, "two of the four federal *judges* who have considered the issue would rule that an arrest warrant was not required." 29 F.2d at 1376 n.6 (Trott, J., diss., emphasis added). Yet the majority below holds that reasonable *police officers* could not disagree on this issue, and that a jury may decide that the Officers here should have known better than two federal judges. Certiorari is needed.

CONCLUSION

This Court has repeatedly emphasized the importance of giving law enforcement officials the latitude to make decisions in "circumstances that are tense, uncertain, and rapidly evolving." *Graham v. Connor*, 490 U.S. at

397. The majority's opinion here does just the opposite. To borrow again the words of Judge Trott:

> Anyone who has ever spent time in the field understands how foolhardy it would be for judges, or even prosecutors, to attempt to tell the police how to flush out an armed, barricaded subject. Experienced peace officers understand the necessity of resolving such a situation as quickly as feasible. Leaving Mr. Quade alone would create not only an unacceptable danger for anyone who must then approach his house, it would also continue to put Mr. Quade in danger of injuring himself. The majority may be prepared to second guess these tough decisions. I am not.

29 F.3d at 1378 (Trott, J., diss.).

On every front, the decision below underestimates the dangers, both to peace officers and to society as a whole, of permitting police tactics to be tried "with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. at 396. Certiorari should be granted.

DATED: November 11, 1994

Respectfully submitted,

LOUISE H. RENNE
San Francisco City Attorney

DENNIS AFTERGUT
Chief Assistant City Attorney

Counsel for Petitioners

APPENDIX A

Julia ALEXANDER, as executor of the estate of Henry O. Quade, Jr., deceased, Plaintiff-Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO, Frank Jordan, John Willett, Timothy Hettrich, Joaquin Santos, Matthew Castagnola, David Seid, Bernard Sullivan, Richard Lee, David Shinn, James Dachauer, Patrick White, Joseph Kennedy, Richard Heller, Steven Gough, Edward St. Andre, Nicholas Borthne, Richard Cunningham, Albert Chinn and Michael Lennon, Defendants-Appellees.

No. 92-16751.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 11, 1994.

Decided July 8, 1994.

Civil rights action was brought against members of police department and city and county for alleged violation of rights of plaintiff's decedent when officers entered his house to arrest him without arrest warrant and for alleged use of excessive force and for failure to train commander involved in incident. The United States District Court for the Northern District of California, D. Lowell Jensen, J., granted defendants' motion for summary judgment on unlawful entry and excessive force claim, held that officers were entitled to summary judgment on basis of qualified immunity, and plaintiff appealed. The Court of Appeals, Fletcher, Circuit Judge,

held that: (1) decedent's Fourth Amendment rights were violated when officers on tactical squad entered his house to arrest him without arrest warrant; (2) administrative warrant to inspect for violations of health and building codes did not authorize entry for purpose of making arrest; and (3) municipality was not liable for failure to train police commander absent showing that alleged inadequacy of training was result of deliberate or conscious choice.

Affirmed in part; reversed in part; and remanded.

Kozinski, Circuit Judge filed concurring opinion.

Trott, Circuit Judge, filed opinion concurring in part and dissenting in part.

Monti J. Stegen and Peter Kagel, Kagel & Stegen, San Francisco, CA; Frank Worthington, Napa, CA, for plaintiff-appellant.

Jean S. Fraser, Deputy City Atty., San Francisco, CA, for defendants-appellees.

Appeal from the United States District Court for the Northern District of California.

Before: FLETCHER, KOZINSKI and TROTT, Circuit Judges.

Opinion by Judge FLETCHER;
Concurrence by Judge KOZINSKI; Partial Concurrence and Partial Dissent by Judge TROTT.

FLETCHER, Circuit Judge:

This civil rights action is brought by the executor of the estate of Henry Quade, who was shot dead in his

home by San Francisco police officers. Plaintiff alleges that Quade's Fourth Amendment rights were violated (1) because the officers entered Quade's home for the purpose of arresting him, but had only an administrative inspection warrant in their possession; and (2) because the officers used excessive force in their entry, thus precipitating the escalation of force which ended in the fatal shooting. Plaintiff also seeks to hold the City and County of San Francisco liable for failure to adequately train the officer in command of the operation.

The district court granted summary judgment for all defendants, holding (1) that Quade was never arrested, and that any detention of Quade by the officers was lawful; and (2) that the officers were entitled to qualified immunity on the excessive force claim. The court also held that because all of the individual defendants were entitled to summary judgment, no liability could attach to the municipality.

We reverse the summary judgment in favor of the individual defendants and affirm the judgment in favor of the municipality, although on different grounds than those relied on by the district court.

BACKGROUND

A. *Factual Background*

In June 1990, the San Francisco Public Health Department received a complaint from a neighbor of Henry Quade that sewage was seeping from Quade's basement into the street and into the foundation of the neighbor's

house, that a foul odor was coming from Quade's house, and that Quade's backyard was filled with refuse.

Health Department officials went to Quade's home to inspect, but no one came to the door. The Health Department sent Quade a Notice to Abate Nuisance, and contacted other interested city agencies. When Health Department officials found the situation unchanged, they summoned Quade to an abatement hearing, which he did not attend. They summoned him to a second and a third abatement hearing, which he did not attend either. They summoned him to a hearing before the Director of Public Health, which once again he did not attend. After his failure to attend the hearing before the director, they sent Quade a letter, and then another letter, requesting him to make an appointment for an inspection of his property. When he did not respond, officials applied to a municipal court judge for an inspection warrant.

The inspection warrant was issued pursuant to Title 13 of the California Code of Civil Procedure, which provides that upon a showing of cause, a court shall command a state or local official

> to conduct any inspection required or authorized by state or local law or regulation relating to building, fire, safety, plumbing, electrical, health, labor, or zoning.

Cal.Code Civ.Proc. § 1822.50. "Cause" exists if, *inter alia*, "there is reason to believe that a condition of nonconformity exists with respect to the particular place." Cal.Code Civ.Proc. § 1822.52. The warrant in this case was issued "for the purpose of discovering if the subject property complies with the Health, Building, Housing, Plumbing,

Electrical, City Planning and Fire Codes, and any other applicable code regulations."

On September 21, 1990, eight days after the warrant issued, Inspector Albert Chinn of the Public Health Department wrote to Quade, advising that Chinn had an inspection warrant; that he would inspect Quade's property on September 28; and that Quade would be required to be there. Chinn also stated that if Quade failed to allow inspection, he would obtain a forcible entry warrant. Chinn invited Quade to contact him to set a different date if more convenient.

Quade did not respond. Nor did Quade respond to representatives of various other city agencies (e.g., Adult Protective Services, outreach programs) who, alerted by the Health Department, had come to his house to investigate. On September 28, the date of the scheduled inspection, Quade once again failed to come to the door when the inspector appeared.

On October 3, 1990, the municipal court judge issued a forcible entry warrant, which authorized entry "for the purpose of discovering if the subject property complies with the Health, Building, Housing, Plumbing, Electrical, City Planning and Fire Codes, and any other applicable code regulations." The warrant also provided that "[s]aid inspection may be made by means of forcible entry." The warrant was issued pursuant to Cal.Code Civ.Proc. § 1822.56, which provides in pertinent part that

> [a] judge may expressly authorize a forcible entry where facts are shown sufficient to create a reasonable suspicion of a violation of a state or local law or regulation relating to building, fire,

> safety, plumbing, electrical, health, labor, or zoning . . . [and] where facts are shown establishing that reasonable attempts to serve a previous warrant have been unsuccessful. Where prior consent has been sought and refused, notice that a warrant has been issued must be given at least 24 hours before the warrant is executed.

In compliance with the latter provision, Chinn wrote to Quade on October 10, 1990, advising him that an inspection had been scheduled for October 16, 1990, and that Chinn had obtained a forcible entry warrant.

On October 16, Public Health officials returned to Quade's house to execute the forcible entry warrant, this time accompanied by Sgt. Heller of the San Francisco Police Department. Sgt. Heller, finding that Quade's door had been nailed shut, moved aside a piece of cardboard covering a window. Quade called from inside "I'm going to get my gun and use it." The sergeant then radioed for reinforcements. A tactical team arrived, as well as a team of hostage negotiators. Representatives of the various city agencies which had become involved in Quade's case were on the scene as well. The hostage negotiators by this time had learned that Quade was mentally unstable, elderly (they believed him to be 70), overweight, and half-blind."

The police cordoned off the area around Quade's house, and a member of the hostage negotiating team tried to talk to Quade. Quade did not respond. After nearly an hour, defendant Captain Willett formulated a plan to enter the house and take Quade into custody; he had been ordered to do the latter by Commander Lennon.

Two officers on the tactical squad broke down the door with a battering ram; seven others entered the house. Five of the seven entered with guns drawn; two did not have their guns drawn, one because he was holding a shield. Quade appeared on top of the staircase holding a .22 caliber handgun. The police ordered him to drop the gun; rather than doing so, however, he said "I told you I was going to use it," and pulled the trigger. The officers shot back, and Quade died from gunshot wounds shortly thereafter. His own gun had apparently misfired, and none of the officers was hurt.

After Quade had been taken to the hospital, the health inspectors came in. They found the house filled with garbage, rotting food, and excrement.

Outside the house, Captain Hettrich, one of the defendants, gave the following statement to the press:

> It wasn't necessarily dangerous but we could have been waiting all day long. The man was just unresponsive to any of our demands, any of our requests. And with the hostage negotiators and myself it appeared that he was not going to respond and uh we felt that rather than keep traffic blocked up and the streets blocked all day long we would try to go in and arrest him.

B. *Procedural Background*

This action was brought under 42 U.S.C. § 1983 by Julia Alexander, executor of Quade's estate, against 16 members of the San Francisco Police Department and the

City and County of San Francisco.[1] Plaintiff moved for summary judgment in her favor on her first theory of liability under § 1983: unlawful entry to effect an arrest. Defendants filed a cross-motion for summary judgment on all claims. In an order dated September 3, 1992, the district court denied plaintiff's motion for summary judgment and granted defendants' motion on the unlawful entry issue, holding that no arrest had been made, that even if there had been a wrongful arrest, defendants were entitled to qualified immunity, and that even if they were not immune, they were entitled to summary judgment on the merits because they were in possession of a lawful administrative inspection warrant.

In an order dated September 11, 1992, the district court granted summary judgment for defendants on plaintiff's second theory of liability. The court held that the officers were entitled to qualified immunity on plaintiff's excessive force claim because their entry into the house was lawful, and because even though it may have been more intrusive than other ways of dealing with Quade, there was no clearly established law requiring the officers to choose any particular method among an array of available tactics. The court also held that because the individual officers were entitled to summary judgment on the basis of qualified immunity, there could be no municipal liability under *Monell v. Department of Social Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Defendants concede that the court's stated basis for this

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[1] Plaintiff also sued public health officials and the Mayor of San Francisco, but has not pursued an appeal against those parties.

latter ruling was incorrect under *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), but argue that the ruling can be sustained on other grounds.

Plaintiff appeals both of the rulings. Her appeal is limited to four defendants: Commander Lennon, who was in charge of the October 16 operation; Captain Hettrich, the "Event Commander," Captain Willett, the "Tactical Commander," and the City and County of San Francisco.

DISCUSSION

The district court had jurisdiction over plaintiff's § 1983 claim under 28 U.S.C. §§ 1331 & 1343. We have jurisdiction under 28 U.S.C. § 1291. We review the district court's summary judgment rulings de novo, *Jones v. Union Pacific R.R.*, 968 F.2d 937, 940 (9th Cir. 1992), and we may affirm on any ground supported by the record. *In re Apple Computer Secs. Litig.*, 886 F.2d 1109, 1112 (9th Cir. 1989), *cert. denied*, 496 U.S. 943, 110 S.Ct. 3229, 110 L.Ed.2d 676 (1990). Summary judgment is appropriate if, viewing the evidence in the light most favorable to the nonmoving party, there are no genuine issues of material fact remaining for trial, and the moving party is entitled to judgment as a matter of law. *Tzung v. State Farm Fire & Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir.1989).

A. *Dismissal of Appeal as to Certain Defendants*

Defendants state in a footnote that the appeal should be "dismissed" against Captains Hettrich and Willett

because Commander Lennon, and not the captains, ordered the entry into Quade's house. Capt. Willett, however, testified that "the method that was utilized to [e]ffect entry and take [Quade] into custody was my decision." CR-75 ex. M, dep. at 228. Capt. Hettrich, when asked whether he had anything to do with the decision-making process, replied "I was acting as an advisor relaying information from the hostage negotiating team to Commander Lennon." CR-75 ex. W, dep at 81. Capt. Hettrich is also listed on a police report as the "Event Commander." This evidence creates at least a dispute of fact as to whether the captains were responsible for the conduct at issue in this lawsuit.

B. *Entry Without an Arrest Warrant*

1. *Plaintiff's substantive argument*

The gist of plaintiff's first theory is that Quade's Fourth Amendment rights were violated when the officers on the tactical squad entered his house to arrest him without an arrest warrant. Plaintiff relies on *Payton v. New York*, 445 U.S. 573, 590, 100 S.Ct. 1371, 1382, 63 L.Ed.2d 639 (1980), in which the Supreme Court held that absent exigent circumstances, police may not enter a suspect's home to make a felony arrest without a warrant.

Defendants argue that they are entitled to summary judgment on plaintiff's *"Payton"* theory because they *had* a warrant: they were assisting the Health Department in executing its forcible entry inspection warrant, and hence were acting under the authority conveyed by that warrant. Defendants argue that there is absolutely nothing unlawful about this.

Defendants cite no federal law dealing with California's forcible entry statute. Instead they rely on *People v. Tillery*, 211 Cal.App.3d 1569, 260 Cal.Rptr. 320 (1989), in which the California Court of Appeal simply assumed that police officers may execute, or in any event assist in executing, forcible entry inspection warrants. The *Tillery* court stated that the 24-hour notice provision of Cal.Code Civ.Proc. § 1822.56 was "designed to preven[t] a violent confrontation between *the police* and the occupier of the premises to be inspected." *Id.* 260 Cal.Rptr. at 324 (emphasis added).[2]

In response, plaintiff argues that the officers had the wrong kind of warrant, or, what amounts to the same thing, that they exceeded the scope of the warrant they had. Plaintiff argues that the officers entered the house for the purpose of arresting Quade, while the purpose of the warrant, by its own terms, was to enable the inspectors to determine whether the property complied with various health and building codes. This substitution of purpose, plaintiff argues, violates the particularity requirement of the Fourth Amendment,[3] and runs afoul

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[2] The *Tillery* court also noted that the statutory scheme authorizing inspections and inspection warrants (Cal.Code Civ.Proc. §§ 1822.50 *et seq.*) was specifically formulated to comply with constitutional mandates, and was enacted in response to the United States Supreme Court's decision in *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). It is for this reason that warrants are issued by a neutral judge rather than by the agency itself, and that the owner of the property is given notice before a forcible entry is made. *Id.* 260 Cal.Rptr. at 322-24.

[3] "[N]o warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the

of those cases which hold that administrative searches may not be converted into tools for law enforcement officials with goals different from those of the agency authorized to conduct the search.

We agree with plaintiff that if in fact the officers' primary purpose in storming the house was to arrest Quade rather than to assist the health officials in executing the inspection warrant, then Quade's Fourth Amendment rights were violated. In *Michigan v. Clifford*, 464 U.S. 287, 294, 104 S.Ct. 641, 647, 78 L.Ed.2d 477 (1984), the Supreme Court held that arson investigators, even if authorized to conduct an administrative search into the cause of a fire, violated the Fourth Amendment when instead their primary purpose was to search for evidence of arson. *Id.* at 297-98, 104 S.Ct. at 648-49.[4] In *United States*

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place to be searched, and the persons or things to be seized." U.S. Const.Amend. IV.

[4] *Clifford* was a plurality opinion, with Justice Stevens concurring separately. 464 U.S. at 299-305, 104 S.Ct. at 649-53. Justice Stevens' disagreement with the plurality rested on the plurality's conclusion that even the search into the cause of the fire was unlawful in the absence of a warrant or some exception to the warrant requirement. Justice Stevens' position was that furnishing notice to the owners of the house would provide more meaningful protection than an administrative warrant (which the plurality held would be sufficient), since such warrants are issued on a showing of less than probable cause. *Id.* at 303-05 & n. 5, 104 S.Ct. at 652-53 n. 5.

Justice Stevens also stated, however, that the search for evidence of crime which followed the search into the cause of the fire would have been improper with or without notice to the residents. *Id.* at 305, 104 S.Ct. at 652-53 (if residents had been given notice, they would have been able to watch while the search was carried out, and "thus might have avoided the

v. $124,570 U.S. Currency, 873 F.2d 1240 (9th Cir.1989), we employed the same approach. Citing *Camara v. Superior Court*, 387 U.S. 523, 537, 87 S.Ct. 1727, 1735, 18 L.Ed.2d 930 (1967), *Wyman v. James*, 400 U.S. 309, 323, 91 S.Ct. 381, 388-89, 27 L.Ed.2d 408 (1971), and *Abel v. United States*, 362 U.S. 217, 230, 80 S.Ct. 683, 692-93, 4 L.Ed.2d 668 (1960), we concluded that "[t]he Supreme Court has repeatedly emphasized the importance of keeping criminal investigatory motives from coloring administrative searches." 873 F.2d at 1244. Accordingly, we held that a claimant's Fourth Amendment rights had been violated when a search conducted by a private airport security company looking for weapons was co-opted by law enforcement agents looking for large amounts of currency associated with drug couriers.

These cases make it very clear that an administrative search may not be converted into an instrument which serves the very different needs of law enforcement officials. If it could, then all of the protections traditionally afforded against intrusions by the police would evaporate, to be replaced by the much weaker barriers erected between citizens and other government agencies. It is because the missions of those agencies are less patently hostile to a citizen's interests than are the missions of the police that the barriers may be as weak as they are and still not jeopardize Fourth Amendment guarantees. *See Camara*, 387 U.S. at 537, 87 S.Ct. at 1735 (approving

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plainly improper search of the entire premises after the cause of the fire had already been identified") (emphasis added). Thus a majority of the Justices subscribed to that part of the *Clifford* opinion on which plaintiff relies.

administrative searches as reasonable in part because "the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, [and hence] involve a relatively limited invasion of the urban citizen's privacy") (*quoted in $124,570,* 873 F.2d at 1244). When the mission of the agency is supplanted by the more antagonistic purposes associated with traditional law enforcement operations, greater protection is required.

Plaintiff argues that all that stood between Quade and a police force intent on his capture was the judgment of a municipal court judge asked to provide authority for sewage abatement, not arrest. We agree that this protection was not sufficient. Without an arrest warrant, and without exigent circumstances, the police had no right to enter Quade's house for the primary purpose of arresting him. The inspection warrant was just that: an inspection warrant.

We cannot agree with Judge Trott that "[n]o legitimate Fourth Amendment purpose is served by forcing the police to go back, yet a third time, to get an arrest warrant." Dissent at 1372. The Health Department officials had an administrative warrant to inspect, nothing more. The purpose which would have been served if the police had secured an arrest warrant was compliance with the Fourth Amendment's particularity requirement, and with those cases from the Supreme Court and our circuit which prohibit police or other officials from using the authority to conduct administrative searches for law enforcement purposes. Had the police obtained a "third warrant," they would have obtained the sanction of a judicial officer to make the arrest – as they were required

to do – rather than making an arrest in the home pursuant to their own assessment of the situation and their own interpretation of their authority to intrude. The Fourth Amendment, as the Supreme Court held in *Payton*, mandates as much.[5]

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[5] We also disagree with Judge Trott's argument that because the "chief evil" *Payton* guards against is entry into the home, and because the officers had a lawful basis for entry in the form of the forcible entry warrant, there was no Fourth Amendment violation. What *Clifford* and *$124,570* teach is that a lawful administrative search may not be used for the *purpose* of pursuing law enforcement ends. It was certainly lawful for the luggage inspectors in *$124,570* to x-ray passengers' suitcases; but when they did so for the *purpose* of discovering currency, they violated the passengers' Fourth Amendment rights. 873 F.2d at 1245-46. Judge Trott is right that *as an initial matter* a forcible entry warrant provides a lawful basis for entry; but what is lawful if done for administrative purposes becomes unlawful if done for law enforcement purposes. *$124,570*, 873 F.2d at 1244, and authorities cited therein. If the police entered Quade's home for a purpose exceeding the scope of the administrative warrant, their entry pursuant to the warrant was not lawful. We are not persuaded by Judge Trott's argument that the officers' purpose was immaterial because the inspection warrant gave them authority to search the house from top to bottom, and hence the scope of the warrant could not be exceeded. The warrant did not give the officers the authority to *arrest Quade*. The forcible entry warrant cannot cure the *Payton* violation, and to suggest that it can is circular.

Judge Trott also argues that because the health inspectors were compelled to make an "individualized showing" in order to secure the forcible entry warrant, the distinction at the heart of *Clifford* and *$124,570* between administrative purposes and law enforcement purposes no longer applies. But it is not enough to make *any* kind of "individualized showing." The Fourth Amendment requires that the showing which is made correspond to the mission for which permission is sought: a

Defendants take a different tack, and argue that the officers' primary purpose in storming the house was not in fact to arrest Quade. But while one of the commanding officers, Capt. Hettrich, testified that no decision to arrest Quade was made prior to entry, CR-75 ex. W, dep. at 82, Capt. Willett testified that "[Commander Lennon] informed me that he would like me to go ahead and take over the operation and to [e]ffect an arrest on Mr. Quade."[6] CR-75 ex. M, dep. at 238. Similarly, a police report prepared by Sgt. David Shinn, one of the leaders of the tactical squad, states that Lt. Joaquin Santos (also of the tactical squad) advised him before entering Quade's house that "our mission was to take the suspect into custody." CR-51 ex. 1 at 3. On summary judgment, we must construe the disputed facts in favor of the nonmoving party, and therefore we must assume that Capt. Willett's and Sgt. Shinn's descriptions of the officers' purpose are correct.

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warrant must "particularly describ[e] the place to be searched and the persons or things to be seized." U.S. Const.Amend. IV. Even a criminal search warrant which does not refer to the homeowner's arrest does not provide authority for arrest. In *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981), where the police had obtained a criminal search warrant, the Court approved of only a *limited* detention of the homeowner, *incident* to the search of the property; thus the search warrant obviously did not provide authority to make the arrest itself. *A fortiori*, the *administrative* warrant in this case did not provide authority to make an arrest, and cannot cure the alleged *Payton* violation.

[6] Moreover, Capt. Hettrich's testimony may be impeached by his prior inconsistent statement. *See supra* at 1358.

We are not persuaded by the proposition, advanced by defense counsel at oral argument, that when police officers use the term "arrest" they in fact mean only the temporary "detention" incident to search which may be effected without an arrest warrant or probable cause to arrest.[7] We are entirely unwilling to conclude that *as a matter of law* a police captain does not know the difference between an arrest and a detention. Counsel is free to make this argument to a jury. But neither the facts nor the law support defendants' bid for summary judgment.

Additional issues raised by defendants, or by the district court's order, reveal that this case can't be dealt with in summary fashion. We address the remaining points seriatim.

2. *The effect of the right to detain*

Defendants argue that any detention of Quade incident to the execution of the inspection warrant was justifiable, and that somehow this justification embraces the right to arrest as well. Defendants rely on *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981), where officers in possession of a search warrant encountered defendant leaving his house as they approached to execute the warrant; the officers detained defendant while searching the premises, and after finding drugs in the house, searched defendant and found more drugs on his person. The Court held that the detention of the defendant incident to the search was lawful.

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[7] *See infra* at 1362-1363.

The dispositive fact in *Michigan v. Summers* was "that the police had obtained a warrant to search respondent's house for contraband." 452 U.S. at 701, 101 S.Ct. at 2593. From that fact, the Court drew various conclusions about the incidental detention of the defendant. First, the detention was "surely less intrusive than the search itself," since "most citizens . . . would elect to remain in order to observe the search of their possessions." 452 U.S. at 701, 101 S.Ct. at 2593. Second, the detention "is not likely to be exploited by the officer or unduly prolonged in order to gain more information, because the information the officers seek normally will be obtained through the search and not through the detention." *Id.* Third, the existence of a search warrant "provides an objective justification for the detention," because "[a] judicial officer has determined that police have probable cause to believe that someone in the home is committing a crime." *Id.* at 703, 101 S.Ct. at 2594. Fourth, the detention may be necessary to facilitate execution of the search warrant – by preventing flight if incriminating evidence is found, and by protecting the officers while they conduct the search. *Id.* at 702-03, 101 S.Ct. at 2594-95.

Many of these observations simply do not hold true when the underlying warrant is an administrative warrant rather than a criminal search warrant.[8] First, citizens may well find it much *more* intrusive to be detained than

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[8] Indeed, the *Summers* Court itself was unwilling to extend its holding even to cases where the warrant authorized a search for mere evidence rather than for contraband. 452 U.S. at 705 n. 20, 101 S.Ct. at 2595 n. 20.

to have their houses inspected for possible noncompliance with health and building codes. Second, there is no assurance here that the police would lack incentive to gain more information through observing or questioning the owner of the place to be inspected; indeed, one of the officers testified that "[w]e went in to *evaluate Mr. Quade*. . . . if there's something to arrest him for, we would have done that." CR-75 ex. P, dep. at 126 (emphasis added). Third, where the underlying warrant is administrative, there will have been *no* determination by a judicial officer "that someone in the home is committing a crime." While in this case plaintiff concedes that Quade was guilty of a crime, this will not always necessarily be so, and in any event, a post-incident determination that a crime was committed is no substitute for a preseizure determination by a judicial officer. The only rationale offered in *Summers* which might apply to this case is the fourth: detention of the occupant is authorized if necessary to facilitate execution of the inspection warrant and to protect the safety of both the inspectors and the officers.

Summers held that officers searching for contraband have *"limited* authority to *detain* the occupants of the premises *while* a proper search is conducted." 452 U.S. at 705, 101 S.Ct. at 2595 (emphasis added). Applied in the administrative context, this amounts to nothing more than what the California Court of Appeal assumed was authorized in *Tillery:* law enforcement assistance in executing an inspection warrant. We do not disagree that rendering such assistance may be appropriate, and may also be constitutional. What plaintiff argues, however, and what she supports with citations to the record, is that

the officers intended much more than a limited and purely incidental detention. She argues that the officers' purpose had shifted from assisting in the execution of the warrant to arresting Quade. The reports and the testimony of the officers who were involved support that assertion. *Summers* does not authorize officers in possession of an administrative inspection warrant to go into a house for the purpose of arresting its occupant. Defendants' reliance on the case is therefore misplaced.

3. *Qualified immunity*

Defendants argue that they are entitled to summary judgment based on qualified immunity. Government officials such as police officers are not absolutely immune from suit, but rather are immune only "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1992). The determination of qualified immunity

> necessitates three inquiries: (1) the identification of the specific right allegedly violated; (2) the determination of whether that right was so "clearly established" as to alert a reasonable officer to its constitutional parameters; and (3) the ultimate determination of whether a reasonable officer could have believed lawful the particular conduct at issue.

Romero v. Kitsap County, 931 F.2d 624, 627 (9th Cir.1991) (citations omitted).

Defendants argue that they are entitled to qualified immunity because Quade had "no clearly established constitutional or statutory right . . . not to have police officers accompany health inspectors executing a forcible entry warrant," and because "Commander Lennon could not have known that he was violating Quade's rights by ordering the officers to enter to make the premises safe." Br. of Appellees at 12. This misstates the inquiry, however. Plaintiff argues that police officers entered Quade's house not for the purpose of making the premises safe, but rather primarily for the purpose of arresting Quade. If that is the purpose, clearly established law requires an arrest warrant, and also prohibits the conversion of an administrative warrant into an all-purpose tool in the hands of law enforcement authorities. Defendants have not shown that a reasonable officer could have believed that entry with intent to arrest would not violate clearly established law. Thus summary judgment on the basis of qualified immunity would be inappropriate if the intent was to arrest or if facts as to intent are in dispute.

A genuine dispute exists as to whether or not defendants ordered the storming of the house primarily for the purpose of arresting Quade. The fact that this dispute turns on an essentially subjective element (the officers' purpose), while qualified immunity involves an inquiry into "objective reasonableness" does not mean that qualified immunity is any more or less available in this context than it would otherwise be. *See Branch v. Tunnell*, 937 F.2d 1382, 1385 (9th Cir.1991) (*Branch I*) (recognizing the "tension" between *Harlow's* emphasis on objective reasonableness and the subjective elements which are at times at

issue in lawsuits against public officials, including lawsuits based on alleged Fourth Amendment violations);[9] *Sloman v. Tadlock*, 21 F.3d 1462, 1468-69 (9th Cir.1994). In short, the factual issues in this case must be decided by a jury before any determination of qualified immunity can be made.

Our decision in *Act Up!/Portland v. Bagley*, 988 F.2d 868 (9th Cir.1993), is not contrary. In the context of a case which turned on whether reasonable suspicion existed, we held that where the underlying facts are undisputed, the court must rule on qualified immunity at summary judgment. *Id.* at 873. Whether or not a reasonable officer would have known that his or her conduct violated clearly established law "is not in itself a factual issue that can preclude summary judgment." *Id.* We also held, however, that "[if] a genuine issue of fact exists preventing a determination of qualified immunity at summary judgment, the case must proceed to trial." *Id.* Here, such a dispute exists.

4. *Lack of formal arrest*

The district court considered at length whether Quade was ever formally arrested, and its summary judgment ruling attaches some significance to its conclusion

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[9] *Branch I's* response to this tension was to follow those courts which have adopted a heightened pleading standard under these circumstances, and have required plaintiffs suing public officials to plead with particularity facts supporting their allegations of unlawful intent. 937 F.2d at 1385-86. That holding was recently affirmed by this court in *Branch v. Tunnell*, 14 F.3d 449 (9th Cir.1994) (*Branch II*).

that even if the police cordon which was formed around Quade's house was "formed for the purpose of accomplishing an arrest . . . [t]he act itself, without a subsequent custodial taking, is not an arrest." District Court Order of September 3, 1992, at 8. We do not decide whether or not forming a cordon constituted a seizure. In our view, whether it did or not is irrelevant. The actions of those defendants against whom plaintiff is pursuing her appeal did not end with the formation of the cordon. Defendants are alleged to have been part of the command structure which ordered the storming of the house. There can be no question but that the shooting of Quade, which followed from the storming, constituted a seizure. *Tennessee v. Garner*, 471 U.S. 1, 9, 105 S.Ct. 1694, 1700, 85 L.Ed.2d 1 (1985) (use of deadly force against a suspect is a seizure within the meaning of the Fourth Amendment); *see also Brower v. Inyo County*, 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989) (same).[10]

The issue in its most simplistic form is whether defendants did something wrong that resulted in Quade's death. We recognize that this is hardly a traditional wrongful arrest case. In the typical case, where the § 1983 plaintiff is formally arrested, he shows at trial that the police failed to comply with Fourth Amendment standards in taking him into custody, and his damages turn on the inconvenience and humiliation he suffered from

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[10] *California v. Hodari D.*, 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991), relied on by the district court, is not contrary. *Id.* at 626, 111 S.Ct. at 1550-51 (physical force constitutes a seizure under the Fourth Amendment).

the arrest. Here, there is none of this kind of indignity, only death.

The causal link between the alleged wrongdoing on which plaintiff's case depends (entry for the purpose of making an arrest) and the injury suffered (not arrest but death) is somewhat more subtle here than in the typical case. At first glance, it may appear that it was the entry itself, rather than the purported unlawfulness of the officers' purpose, which precipitated Quade's death. But assuming for purposes of summary judgment that the officers' purpose was unlawful, we need to keep in mind that we simply do not know how matters would have turned out if the officers had entered solely for the purpose of inspection. At trial, plaintiff's argument might run something like this: if the officers' purpose had been what it should have been (to assist the public health officials in serving the warrant), their manner of entry would have been different, and might in turn have evoked a different response from Quade – a response which would not have led to an armed standoff and ultimately to death.

Alternatively, plaintiff might argue that if the police had halted their activities and then gotten an arrest warrant, this too might have avoided the final tragic confrontation. Given the delay attendant in obtaining the warrant, the police might well have sent the gathered city officials away, and then, without the pressure of their presence, and without the expectation that an inspection could be conducted any time soon, might have allowed events to unfold more slowly. Plaintiff could argue, in other words, that it was the purpose of arrest or indeed the combination of purposes – health inspection plus

arrest – which led to such fatal consequences. This theory of causation, in fact, follows more or less precisely from plaintiff's theory of misconduct, which is that the officers improperly overlaid the administrative purposes of the inspection warrant with law enforcement purposes of their own.

In sum, we conclude that with respect to plaintiff's unlawful entry theory, defendants are not entitled to summary judgment on any of the grounds set forth in their brief or in the district court's order.[11]

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[11] Nor are the points raised *sua sponte* by Judge Trott of any assistance to defendants. Judge Trott argues that the officers' entry was justified by exigent circumstances and by Quade's commission of a felony in the presence of Sgt. Heller. Both arguments were wisely eschewed by defendants. The exigency argument is simply not supported by the facts: Capt. Hettrich stated to the press that the situation was not "necessarily" dangerous, and that the police ultimately decided to storm the house because they did not want to keep traffic blocked up all day. The defendants also note that a perimeter was set up around Quade's house "to ensure the safety of bystanders and officers on the scene." Thus according to defendants' own description, steps had been taken to eliminate the exigency which Sgt. Heller identified as existing at the moment Quade made his threat. The record simply does not support Judge Trott's assertion that there was no time to secure a warrant because of the imminent and continuing danger to persons outside the house.

Judge Trott may not avoid this fact by labelling defendants' characterization of the danger Quade presented as "subjective." Capt. Hettrich's eyewitness account is relevant in establishing what happened. And our citation to Capt. Hettrich's videotaped statement is altogether proper. The video was before the district court at the time it disposed of the case in its entirety. In any event we rely on the video not to reject an exigent circumstances argument made by defendants, but rather to explain why it

C. *Excessive Force*

It is important to understand exactly what plaintiff claims. She argues that it was unreasonable for the

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might be that defendants *have never raised such an argument*, and that therefore the argument is *simply not before this court*.

The argument that Quade committed a felony in the presence of Sgt. Heller, while supported by the facts, is without legal significance. If Quade had been in a public place, rather than in his home, the police could have made a warrantless felony arrest on the basis of probable cause whether or not Quade committed the felony in their presence. *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976). Similarly, had Quade been in a public place and committed a misdemeanor in the officers' presence, the officers could also have made a warrantless arrest. *Higbee v. City of San Diego*, 911 F.2d 377, 379 (9th Cir.1990). But since Quade was in his home, matters stand differently. *Payton* holds that in order to make a felony arrest in the home, the police *must* have a warrant, absent exigent circumstances. Under *Payton*, exigency is the *only* exception to the warrant requirement; commission of a crime in an officer's presence is not an exception. Judge Trott cites language from *Payton's* discussion of English common law which suggest that that law may have recognized a "commission in the presence of officers" exception. But *Payton's holding* does not embrace this exception. *Payton* states unequivocally that "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." 445 U.S. at 590, 100 S.Ct. at 1382.

Tellingly, Judge Trott does not cite a single case in which an exception to *Payton* has been made for a subsequent arrest simply because a felony was committed in an officer's presence. Yet we know that criminals commit crimes in the presence of law enforcement agents every day: a great many of our drug cases involve undercover work by the police. If Judge Trott's argument were correct, *Payton* would not apply in those cases, and the undercover agent, accompanied by his colleagues, at a later time could forcibly enter the home of a person from whom he had bought drugs and make a warrantless arrest of that

officers to storm the house of a man whom they knew to be a mentally ill, elderly, half-blind recluse who had threatened to shoot anybody who entered. Plaintiff does not argue that once Quade pointed his gun at the officers and pulled the trigger, the officers used unreasonable force in shooting to kill. Rather, plaintiff argues that defendants used excessive force in creating the situation which caused Quade to take the actions he did.[12] She also takes pains to explain on appeal that her excessive force claim has never been premised solely on the argument that the force used by the officers was unreasonable

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person. We are not aware of any case in which the government has hazarded such an argument, and we believe any court would reject it as an unwarranted and unsupported erosion of *Payton*.

If Judge Trott is making the narrower argument that an officer has a right to enter the home to make an arrest when a felony occurs within an officer's view but inside the suspect's home (with the officer looking in from outside), we agree that in most cases the officer probably does have this right. But that is because there are exigent circumstances, not because some special "commission in the officer's presence" exception is recognized. Indeed, exigent circumstances was the analysis used in the one case we are aware of in which a felony was committed both inside the suspect's home and in the officers' presence, *United States v. Crespo*, 834 F.2d 267 (2d Cir. 1987), *cert. denied*, 485 U.S. 1007, 108 S.Ct. 1471, 99 L.Ed.2d 700 (1988).

[12] Thus Judge Trott's observation that the officers showed commendable restraint once inside the house, while accurate, is irrelevant. The excessive force claim turns on the force the officers used in entering the house, not the force they used or didn't use once they had entered.

because the officers failed to exhaust less intrusive alternatives.[13] In essence, her claim is that Quade's Fourth Amendment rights were violated because the force the police used was unreasonable under *all* of the circumstances.

Plaintiff's claim, if supported by the evidence, states a classic Fourth Amendment violation under *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 1872-73, 104 L.Ed.2d 443 (1989). There, the Supreme Court held that a police officer's use of force in apprehending a suspect violates the Fourth Amendment if it is unreasonable in light of the facts and circumstances confronting the officer. Those circumstances, under both *Graham* and the excessive force cases from this circuit, include " 'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers, and whether he is actively resisting arrest or attempting to evade arrest by flight.' " *Hopkins v. Andaya*, 958 F.2d 881, 885 (9th Cir.1992) (per curiam) (quoting *Graham*, 490 U.S. at 396, 109 S.Ct. at 1871-72).

Summary judgment is inappropriate, since whether the officers entered for the purpose of arresting Quade or for the purpose of assisting in the execution of the inspection warrant is in contention, as is the reasonableness of the force. The force which was applied must be balanced against the *need* for that force: it is the need for force

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[13] Thus we need not, and do not, express any opinion on the validity of that argument. We note that the argument was rejected in *Scott v. Henrich*, 978 F.2d 481 (9th Cir.1992), but that since the briefs in this case were filed, the opinion in *Scott* has been withdrawn. 994 F.2d 1343 (9th Cir.1993).

which is at the heart of the consideration of the *Graham* factors. If the jury were to find that the officers entered in order to help the inspectors inspect – as defendants contend on appeal – then the jury may also conclude that the force used (deployment of a SWAT team) was excessive in relation to the purpose for which it was used (ensuring the immediate execution of a forcible entry inspection warrant). On the other hand, if the jury were to conclude that the officers entered for the purpose of arresting Quade, they may conclude that storming the house was in fact commensurate with need (arresting a man who had threatened to shoot anyone who came into his house), and hence that the force was reasonable.

We conclude that the dispute as to the facts precludes summary judgment for defendants both on the merits and on defendants' qualified immunity claim. *See Palmer v. Sanderson*, 9 F.3d 1433, 1436 (9th Cir.1993); *Act Up!*, 988 F.2d at 873; *Hopkins*, 958 F.2d at 885 n. 3.

D. *Municipal Liability*

Under *Monell v. Department of Social Servs.*, 436 U.S. 658, 690, 98 S.Ct. 2018, 2035-36, 56 L.Ed.2d 611 (1978), a municipality may be liable under § 1983 "only if its policy or custom caused the constitutional deprivation complained of." *Mateyko v. Felix*, 924 F.2d 824, 826 (9th Cir.1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 65, 116 L.Ed.2d 40 (1991) (citing *Monell*). Plaintiff attempts to tie the acts of the individual defendants to a custom or policy of the City and County of San Francisco in two separate ways. We reject both.

1. *Inadequate training*

First, plaintiff argues that the municipality was responsible for Quade's injuries because it failed to train Commander Lennon adequately in the proper response to "barricaded subject situations" and in the proper procedures for arresting suspects in their homes. "[T]he inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton v. Harris*, 489 U.S. 378, 388, 109 S.Ct. 1197, 1204, 103 L.Ed.2d 412 (1989). Although "[w]hether a local government entity has displayed a policy of deliberate indifference is generally a question for the jury," *Oviatt v. Pearce*, 954 F.2d 1470, 1478 (9th Cir.1992), we conclude that in this case the municipality is entitled to summary judgment.

In those cases where we have held that a question of fact existed as to the deliberately indifferent character of a municipality's failure to train, plaintiffs have alleged a program-wide inadequacy in training. *Davis v. Mason County*, 927 F.2d 1473, 1483 (9th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 275, 116 L.Ed.2d 227 (1991); *Reed v. Hoy*, 909 F.2d 324, 331 (9th Cir.1989), *cert denied*, 501 U.S. 1250, 111 S.Ct. 2887, 115 L.Ed.2d 1053 (1991). Here, by contrast, plaintiff argues only that the training of Commander Lennon was inadequate. She has produced no evidence showing that the alleged inadequacy of his training was the result of a "deliberate" or "conscious" choice, which, under *Canton*, is necessary to establish a municipal policy. 489 U.S. at 389, 109 S.Ct. at 1205; *see also Ting v. United States*, 927 F.2d 1504, 1512 (9th Cir.1991). Absent such

evidence, any shortfall in Lennon's training can only be classified as negligence on the part of the municipal defendant – a much lower standard of fault than deliberate indifference.

The deliberate indifference standard was specifically adopted by the Supreme Court in order to ensure that civil rights claims against municipalities attain a certain level of gravity before those entities are compelled to defend themselves at trial. *Canton*, 489 U.S. at 391-92, 109 S.Ct. at 1206-07. Much of that assurance would be removed if plaintiffs could proceed to trial against a municipality on the basis of the failure to train a single officer, and without any showing that this failure was the result of a conscious or deliberate choice. By limiting her proof to the adequacy of the training of a single officer, plaintiff has failed to create a genuine issue of fact as to the alleged deliberate indifference of the municipality.

Plaintiff also argues that the deposition testimony of Sgt. Stasko reveals that Lennon's actions were "in accordance with San Francisco Police Department training." Reply Br. at 22. Possibly this testimony, if further developed, would reveal the type of department-wide inadequacy of training missing from plaintiff's proof.

However, Stasko's deposition was not presented to the district court because it had not yet been taken when the summary judgment motion was heard. Plaintiff does not explain why she could not have taken Stasko's deposition in a timely fashion. Consequently, we do not consider it. In *Hopkins*, where "appellants offer[ed] no excuse for not presenting [an] affidavit earlier," we refused to

consider the affidavit, explaining that "[a] defeated litigant cannot set aside a judgment because he failed to present on a motion for summary judgment all the facts known to him that might have been useful to the court." 958 F.2d at 887 n. 2. Although here the facts revealed by Stasko may not have been known to plaintiff at the relevant time, plaintiff's failure to explain why she could not have learned of those facts sooner is fatal. We follow *Hopkins,* and do not consider Stasko's testimony.

2. *Acts of a policymaker*

Plaintiff also suggests that regardless of Lennon's training, his acts may give rise to municipal liability in and of themselves because Lennon's high rank enabled him to establish municipal policy. In *Pembaur v. Cincinnati,* 475 U.S. 469, 481, 106 S.Ct. 1292, 1299, 89 L.Ed.2d 452 (1986), the Supreme Court held that where "[a] decision to adopt [a] particular course of action is properly made by [a] government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood." Plaintiff, however, cites neither facts nor law showing that a San Francisco police commander is an authorized decisionmaker for the City and County of San Francisco. We therefore reject this argument.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

KOZINSKI, Circuit Judge, concurring.

I join Judge Fletcher's thorough and thoughtful opinion but add a few words to emphasize what I see as the

key issue in this case. Assuming, as we must, that the police conducted their raid on Quade's house in order to arrest him on suspicion of a crime, it was clearly established that they needed a warrant. *Michigan v. Clifford*, 464 U.S. 287, 297-98, 104 S.Ct. 641, 648-49, 78 L.Ed.2d 477 (1984); *Payton v. New York*, 445 U.S. 573, 590, 100 S.Ct. 1371, 1382, 63 L.Ed.2d 639 (1980).

No exigency stood in the way of seeking a warrant. *Cf. Michigan v. Clifford*, 464 U.S. at 292-93, 104 S.Ct. at 646-47; *Michigan v. Summers*, 452 U.S. 692, 702, 101 S.Ct. 2587, 2594, 69 L.Ed.2d 340 (1981). The suspect was encircled and was no threat to anybody. Keeping the house blockaded long enough to apply for a warrant would have been a nuisance but, as best the record discloses, posed no danger to the community. *See* Maj.Op. at 1365 n. 11.

And seeking a warrant could have made a difference here. I seriously doubt a reasonable judicial officer would have authorized the immediate storming of Quade's residence by a heavily armed tactical team. Instead, he might have required exhaustion of less intrusive alternatives, like using tear gas or waiting Quade out. *See, e.g.*, Paul Pringle & Shante Morgan, *O.J. Surrenders: Bizarre Chase Ends in Standoff at Estate*, San Diego Union-Trib., June 18, 1994, at A1. Or, perhaps the judge would have concluded that, if entry for purposes of a health inspection could only be achieved by the use of shock troops, it wasn't worth the risk to life and property. Quade, after all, was a half-blind recluse, an eccentric, perhaps in need of medical attention – not David Koresh.

Under *Payton*, the potentially fatal decision to confront a suspect within his own home is taken away from those on the scene, whose judgment may be clouded by an understandable, but perhaps misguided, sense of urgency. What is striking about the fact pattern here is the massive disproportionality of the response to the problem of a leaky sewer pipe. I would like to believe that, had *Payton* been followed, the judicial officer from whom the warrant was sought would have injected a measure of objectivity and detachment, perhaps saving Quade's life. By failing to take this constitutionally-required step, the officers short-circuited the built-in safeguard of the warrant requirement, costing Quade his life and exposing themselves to liability.

TROTT, Circuit Judge, concurring in part and dissenting in part:

I respectfully disagree with the majority's analysis of the constitutional propriety of the police's conduct in this case. Mr. Quade's death was tragic, but that tragedy is only compounded by forcing police officers to stand trial when their actions were clearly reasonable. At the very least, they are surely entitled to qualified immunity. My main concern, however, is that the majority's opinion not only misapplies, but literally wreaks havoc on the Fourth Amendment and the law covering forcible inspection warrants.[1]

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[1] Because I believe the police officers acted reasonably and constitutionally, I obviously concur with the majority's rejection of municipal liability.

I

A. The majority fails to appreciate the significance of the magistrate's issuance of a *forcible* entry inspection warrant. Actually, the City applied for and obtained not one, but *two* administrative inspection warrants for Mr. Quade's premises before they set foot in his house.

The first warrant (No. 90-5), properly supported by a declaration from a public health inspector and prepared by a deputy city attorney, was secured from the San Francisco Municipal Court on September 13, 1990. The inspection warrant states:

> YOU ARE THEREFORE COMMANDED on September 19, 1990, or as soon thereafter as practicable, but no later than September 28, 1990, between the hours of 8:00 a.m. and 5:00 p.m. to arrange and conduct a complete inspection of the said premises by and through all appropriate inspectors for the City and County of San Francisco, for the purpose of discovering if the subject property complies with the Health, Building, Housing, Plumbing, Electrical, City Planning and Fire Codes, and any other applicable code regulations. *Said inspection may not be made by means of forcible entry.*

(emphasis added). Three aspects of this court order are noteworthy. First, the City secured the warrant only after receiving public complaints about malodorous sewage and garbage in and about Mr. Quade's house, sending health inspectors on numerous occasions to his house, and posting multiple notices on his front door. The City even sent a public health nurse on two occasions to evaluate Mr. Quade's health. He did not respond. The

City's actions failed to abate the problem, and neighbors continued to complain about sewage flowing from Quade's house onto their property. Second, the warrant and its supporting documentation comply in all respects with the letter of the law. Third, forcible entry, although not requested, was explicitly prohibited. This inspection warrant represents a measured, reasonable, legal response by both the City and the magistrate to months of intransigence by Mr. Quade. Mr. Quade's intransigence perpetuated a sewage problem that, according to the health inspector, "presented immediate public health problems in the form of possible enteric and respiratory diseases."

The City then notified Mr. Quade in writing of the existence of this first warrant and gave him seven days to prepare for an inspection scheduled for the 28th of September. He was told to call the City's Principal Health Inspector to arrange a different date if the one set by the City was undesirable. The City never received a response.

On September 28, Mr. Quade was either not present or did not answer the door, thwarting the commanded service of the inspection warrant. Dutifully, Inspector Chin returned to the Municipal Court, again accompanied by a deputy city attorney. This time he requested a new inspection warrant authorizing "forcible entry." He based this request on the owner's manifest refusal to cooperate with the City and to honor the first inspection warrant. The request by the City for forcible entry was absolutely proper and appropriate. California law specifically provides for such requests: "An inspection pursuant to a warrant shall not be made by means of forcible entry, except . . . where facts are shown establishing that

reasonable attempts to serve a previous warrant have been unsuccessful." Cal.Civ.Proc.Code § 1822.56 (West 1982).

Consequently, Judge Mallen issued a second inspection warrant (No. 90-6) for Mr. Quade's premises "commanding a timely search between October 9, 1990 and October 16, 1990." The warrant explicitly stated that the commanded inspection "may be made by means of *forcible* entry." (emphasis added). This provision is beyond legal reproach. The City then advised Mr. Quade by mail of the existence of this second warrant. A copy of the warrant itself was included in the mailing, and the inspection was set for October 16, 1990. Notwithstanding Mr. Quade's intransigence, the City continued to respect his privacy.

This is the situation in which the City found itself on October 16, 1990, the day of the fatal shooting. Twice the City had taken its case before a neutral magistrate. The City had incrementally secured not only one but *two* inspection warrants for Mr. Quade's premises. A magistrate had ordered that Quade's privacy interest yield to the public's legitimate interest in health and safety. After making an adequate showing under the proper statute, the City had been given explicit judicial authority for forcible entry based on reasonable but unsuccessful attempts to serve the first warrant. The second warrant was legally as sound as the first, authorizing the City to breach Mr. Quade's privacy and inspect the interior of his house.

In my view, the clearly established law at the time of the entry of Mr. Quade's premises authorized the City

under these circumstances to secure the assistance of the police to keep the peace during the service of this forcible entry warrant. Such a proposition would seem to be beyond debate, and I can find no case indicating to the contrary. What is a police department for if not to keep the peace during the service of a forcible entry warrant?

People v. Tillery, 211 Cal.App.3d 1569, 260 Cal.Rptr. 320 (1989), is a California case embracing this proposition. In *Tillery*, the building inspectors and the assisting deputy sheriffs had an inspection warrant, but unlike the warrant in this case, it did not authorize forcible entry. When they tried to serve it, they were met with resistance by the landowner. Under those circumstances, the *Tillery* court prescribed the following:

> [O]nce appellant had explicitly refused to consent to the inspection, the authority to execute the warrant ended. At this point, the officers had no right to force appellant out of his car and back to the gate to open it so the officers could get onto the premises. Under the statutory procedures mandated for administrative inspections, the officers' only alternative once appellant refused to accept the warrant or to otherwise consent to the inspection of the premises was either to allow appellant to go on his way or to arrest him for willful refusal to permit an inspection lawfully authorized by the warrant, a misdemeanor under section 1822.57. The latter option would have justified the officers' placing appellant in the patrol car and taking him to the station for booking on the misdemeanor. *To continue the search by any forceful*

> *means, however, required another warrant containing a judge's specific authorization of a forcible entry of the premises.*

Id. 260 Cal.Rptr. at 324 (emphasis added). Thus, California law encouraged the City and the police to do exactly what they did – secure a forcible entry inspection warrant and have the police accompany the inspector.

The controlling law clearly also permitted the police to seize and detain, if necessary, the occupant of a house so that a *forcible* entry inspection warrant could be peacefully served and the house searched, especially when the predicate for the approval of forcible entry is the occupant's apparent resistance to previous attempts at entry and inspection. As authority for this wholly intuitive proposition, I rely on *Michigan v. Summers*, 452 U.S. 692, 705, 101 S.Ct. 2587, 2595-96, 69 L.Ed.2d 340 (1981): "[F]or Fourth Amendment purposes, we hold that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted."

Summers, of course, involved a criminal search warrant which was issued based on a showing of probable cause to believe the residence to be searched contained contraband. This difference raises the question of whether the occupant-detention principle confirmed by the Court in *Summers* applies only to criminal warrants, or whether it also applies to forcible entry inspection warrants. The answer based on the Court's reasoning in *Summers* surely is that the occupant-detention principle applies to both situations. In each case, a

> neutral and detached magistrate will have authorized a substantial invasion of the privacy of the persons who reside there. The detention of one of the residents while the premises [are] searched, although admittedly a significant restraint on his liberty, [is] surely less intrusive than the search itself. Furthermore, the type of detention imposed . . . is not likely to be exploited by the officer or unduly prolonged in order to gain more information, because the information the officers seek normally will be obtained through the search and not through the detention.

Id. at 701, 101 S.Ct. at 2593 (footnotes omitted).

Moreover, the Court provided this instructive language in *Summers*, language that seems equally as applicable to *forcible* inspection warrants as it does to criminal warrants for contraband:

> Less obvious, *but sometimes of greater importance, is the interest in minimizing the risk of harm to the officers.* Although no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence. The risk of harm to both the police and the occupants is minimized if the *officers routinely exercise unquestioned command of the situation.*

Id. at 702-03, 101 S.Ct. at 2594 (emphasis added) (footnote omitted).

The logic and common sense of the Supreme Court's statement applies four square to the situation the health inspectors and the officers confronted in this case. The

forcible execution of an inspection warrant issued after an occupant has refused entry is precisely the "kind of transaction that may give rise to sudden violence." *Id.* at 702, 101 S.Ct. at 2594. Accordingly, "the risk of harm to both the police [and the health inspectors] and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Id.* at 702-03, 101 S.Ct. at 2594. Under the circumstances therefore, the fact that *Summers* involved a criminal search warrant, whereas the instant case involves a forcible entry inspection warrant, is irrelevant. To hold otherwise would be to be blinded by form over reason and substance. The need-based principle permitting and encouraging the police to keep the peace is sound in both settings.

The police's withdrawal to a position of safety and call for mental health experts hardly renders their behavior unreasonable. District Judge Jensen's insight into this situation is correct:

> Plaintiff would have the Court conclude that, because the officers retreated rather than entered immediately to ensure the premises were safe for inspection, the officers somehow converted their legal right to enter into an unlawful arrest. Such a decision would encourage police officers to act impulsively to preserve their lawful right of entry, rather than carefully to ensure the safety of the officers, the occupants, and the inspection officials.

Nevertheless, the majority concludes that if the police entered Mr. Quade's house for the primary purpose of arresting him, their entry was unlawful because they didn't have an arrest warrant. *Payton v. New York,*

445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), however, does not compel that result. In *Payton*, the Court held, absent exigent circumstances or *any* kind of warrant issued by a neutral magistrate, the police may not enter a suspect's home to make an arrest. The Court based its holding on the principle that " 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.' " *Id.* at 585, 100 S.Ct. at 1379-80 (quoting *United States v. United States Dist. Court*, 407 U.S. 297, 313, 92 S.Ct. 2125, 2134-35, 32 L.Ed.2d 752 (1972)); *see also Summers*, 452 U.S. at 701, 101 S.Ct. at 2593-94. The arrest warrant serves this goal by "interpos[ing] the magistrate's determination of probable cause between the zealous officer and the citizen." *Payton*, 445 U.S. at 602, 100 S.Ct. at 1388.

Here, the City went *twice* to a magistrate, securing the authority to forcible enter and inspect Mr. Quade's home. No legitimate Fourth Amendment purpose is served by forcing the police to go back, yet a third time, to get an arrest warrant. A neutral and detached magistrate had already determined that the privacy of Quade's home should be breached – forcible breached. If "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed," the magistrate authorized the invasion of that interest by issuing the forcible entry inspection warrant. Because the police may arrest a felony suspect in a public place without an arrest warrant, the arrest warrant only protects against entry into the home, not arrest. One commentator has concluded, therefore, that "no warrant is needed to arrest if there is another lawful basis for the entry." *See* 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth*

Amendment § 6.1(c), at 585 (2d ed. 1987). I believe the forcible entry inspection warrant unmistakably provided that legal authority.

The majority relies on *Michigan v. Clifford*, 464 U.S. 287, 104 S.Ct. 641, 78 L.Ed.2d 477 (1984) and *United States v. $124,570 U.S. Currency*, 873 F.2d 1240 (9th Cir.1989), to support its contrary conclusion. Two concerns animated those cases. First, administrative searches or warrants are generally subject to less judicial scrutiny than criminal warrants. *See, e.g., Camara v. Municipal Court*, 387 U.S. 523, 538, 87 S.Ct. 1727, 1735-36, 18 L.Ed.2d 930 (1967) ("[H]ealth official need [not] show the same kind of proof to a magistrate to obtain a warrant as one must who would search for the fruits or instrumentalities of crime."). Second, when criminal investigatory motives are present, the scope of administrative searches may be unnecessarily expanded, increasing the privacy intrusion. *See $124,570 U.S. Currency*, 873 F.2d at 1245-46 (cooperation policy with U.S. Customs may encourage private airport security personnel "to conduct more searches, and more intrusive searches, than if they focus on air safety alone").

Those concerns are not implicated in this case. To issue the forcible entry inspection warrant, the magistrate had to find that "reasonable attempts to serve a previous warrant have been unsuccessful." *See* Cal. Civ.Proc.Code § 1822.56. Thus, the showing necessary for a forcible entry inspection warrant was very similar to the showing necessary for an arrest warrant for refusal to permit an authorized inspection. *See id.* § 1822.57. In other words, the forcible entry inspection warrant for Quade's residence, unlike regular inspection warrants, was only

issued after a particularized showing that reasonable attempts to serve the previous warrant had been unsuccessful. This procedure forced the magistrate to give special attention to the matter. The heightened judicial scrutiny and individualized showing ensures the forcible entry inspection warrant procedure is more akin to the traditional Fourth Amendment protections of a criminal warrant than the less stringent standards of a regular inspection warrant.

More importantly, even if the police intended to arrest Mr. Quade when they entered the residence, there was no danger that the police would improperly expand the scope of their authorized search. In *Clifford*, a majority of the Court held that arson investigators, even if authorized to conduct an administrative search into the cause of the fire, violated the Fourth Amendment when they searched the upstairs of the house after discovering that the fire started in the basement. *See* 464 U.S. at 297-98, 104 S.Ct. at 648-49 (plurality opinion); *id.* at 300, 104 S.Ct. at 650 (Stevens, J., concurring in the judgment). Once the investigators began searching the upstairs, it became clear that they were searching for evidence of criminal activity, not determining the cause and origin of the fire. According to the Court, a criminal search warrant was therefore required. *See id.* at 294, 104 S.Ct. at 647. Similarly, in *$124,570 Currency*, we expressed concern that airport security might improperly expand weapon searches if they were rewarded for reporting the detection of drugs or large amounts of currency. 873 F.2d at 1245-46.

Here, the forcible entry inspection warrant authorized the City to break down Quade's door and *inspect the*

entire premises for a variety of health and safety violations. Unlike *Clifford* and *$124,570 U.S. Currency*, there was no danger that the police would expand the scope of their authorized search if they intended to arrest Quade. The search for Quade could not be more intrusive than a search for health and safety violations, and the police would still need probable cause to arrest. The majority's response is "what is lawful if done for administrative purposes becomes unlawful if done for law enforcement purposes." The majority focuses on the officers' purpose or intent in entering Mr. Quade's residence, but ignores the rationale for *Clifford* and *$124,570 U.S. Currency*. The officers' subjective intent is only relevant if it suggests they might expand the scope of the administrative search. An "improper purpose," by itself, does not constitute a Fourth Amendment violation.

Furthermore, in neither *Clifford* nor *$124,570 U.S. Currency* was *any* type of warrant secured. By contrast, the City secured a valid inspection warrant from a neutral magistrate in this case. Because an arrest warrant protects against entry into the home and the forcible inspection warrant already authorized entry, an arrest warrant would serve no purpose.

B. There exists yet another lawful basis for the police's entry. When Mr. Quade told the officers he was going to get his gun "and use it," Quade arguably committed several serious felonies in the presence of the police. These additional offenses were not only committed in the presence of the police, but directed at them.

Under the California Penal Code, it is unlawful for anyone to attempt "by means of any threat or violence, to

deter or prevent an executive officer from performing nay duty imposed upon such officer by law," or to "knowingly resist[ ], by the use of force or violence such officer in the performance of his duty." Cal.Penal Code § 69 (West 1988); *see id.* at § 77 (extending same protection to administrative and ministerial officers). Simple refusal to permit an authorized inspection is a misdemeanor, *see* Cal.Civ.Proc. Code § 1822.57, but section 69 elevates resistance *by threat or violence* to a felony. It is also a felony to knowingly confront with a firearm a uniformed peace officer performing his or her official duties. Cal.Penal Code § 417(c) (West Supp.1994).[2] Furthermore, Mr. Quade stated an intention to immediately commit the felony crime of assault with a deadly weapon. *Id.* § 245(a)-(b). Again, his targets were the inspectors and the police commanded to serve this warrant.

Thus, Mr. Quade's resistance and contemporaneous threats of force and violence amounted to the commission of a felony in the presence of the officers as they were serving the warrant, in violation of California Penal Code sections 69 and 77, a felony for which they were entitled, *then and there*, to make an arrest. Quade's behavior also

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[2] Under California law, a felony statue may be used to prosecute an individual even though a special misdemeanor statute covers similar conduct, if the felony statute contains additional elements. *See People v. Robertson*, 223 Cal.App.3d 1277, 273 Cal.Rptr. 209, 211-12 (1990); *People v. Weltsch*, 84 Cal.App.3d 959, 149 Cal.Rptr. 112, 113-14 (1978); *People v. Hathaway*, 27 Cal.App.3d 586, 103 Cal.Rptr. 638, 641 (1972); *People v. Firestine*, 268 Cal.App.2d 533, 74 Cal.Rptr. 168, 173-74 (1968); *People v. Jones*, 228 Cal.App.2d 74, 39 Cal.Rptr. 302, 307 (1964); *see also People v. Bertoldo*, 77 Cal.App.3d 627, 143 Cal.Rptr. 675, 678-79 (1978).

gave the police probable cause to immediately arrest him as he attempted to violate sections 245 and 417(c). The police did not have to wait until Quade actually got the gun in his hand before they could react.

Payton does not foreclose the police from entering a house without an arrest warrant when a felony is contemporaneously committed in their presence. In *United States v. Watson*, 423 U.S. 411, 418, 96 S.Ct. 820, 825, 46 L.Ed.2d 598 (1976) (emphasis added), the Court, upholding the right to make warrantless felony arrests in public, stated:

> The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to *arrest without a warrant for a misdemeanor or felony committed in his presence* as well as for a felony not committed in his presence if there was reasonable grounds for making the arrest.

In *Payton*, the Court, distinguishing *Watson*, observed that the "common-law rule on warrantless home arrests was not as clear as the rule on arrests in public places." 445 U.S. at 596, 100 S.Ct. at 1385. The Court noted:

> A study of the common law on the question whether a constable had the authority to make warrantless arrests in the home on mere suspicion of a felony – *as distinguished from an officer's right to arrest for a crime committed in his presence* – reveals a surprising lack of judicial decisions and a deep divergence among scholars.

Id. at 592, 100 S.Ct. at 1383.[3]

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[3] Blackstone makes the following distinction:

> Any private person (and a *fortiori* a peace officer) that is present when any felony is committed, is

The present case is distinguishable from *Payton* because Mr. Quade committed a felony or felonies in the presence of the officers. In fact, the felonies were directed at the officers. Whether *Payton* is distinguishable based on the common law of arrest warrants or the existence of exigent circumstances, I do not believe the Fourth Amendment shackles the police from stopping a felony conducted in their presence and directed at them. *Cf. United States v. Crespo*, 834 F.2d 267, 270-71 (2d Cir.1987) (justifying warrantless entry based on threats made against a federal informant in the presence of federal agents), *cert. denied*, 485 U.S. 1007, 108 S.Ct. 1471, 99 L.Ed.2d 700 (1988).[4]

> bound by the law to arrest the felon, on pain of fine and imprisonment, if he escapes through the negligence of the stands-by. And they may justify breaking open doors upon following such felon. . . . Upon probable suspicion a private person may arrest the felon, or other person so suspected. But he cannot justify breaking open doors to do it. . . .

4 William Blackstone, *Commentaries* *293. This distinction survives today under the doctrine of "hot pursuit." *See United States v. Santana*, 427 U.S. 38, 42-43, 96 S.Ct. 2406, 2409-10, 49 L.Ed.2d 300 (1976).

[4] The majority contends Quade's commission of a felony in the presence of a police officer is "without legal significance." The majority argues that exigency is the only exception recognized by *Payton*. But in both *Payton* and *Watson*, the Supreme Court relied heavily on the common-law rules of arrest to shed light on what the Framers of the Fourth Amendment meant by the term "reasonable." If the common law recognized a right to arrest for a felony contemporaneously committed in the officer's presence, then this case is more like *Watson*, where the Court allowed warrantless arrest, than *Payton*.

C. When Mr. Quade threatened to resort to armed resistance, he confronted the officers with a classical and unmistakable situation involving exigent circumstances, *i.e.*, an immediate armed threat to the safety of the police officers, the health inspectors, Mr. Quade's immediate neighbors, and the general public by a barricaded and unstable recluse. I disagree completely with the majority's unsupported and surprising statement that exigent circumstances were not present in this confrontation.

There is no such thing as an armed, encircled suspect who is not a threat. People like Mr. Quade frequently shoot from their homes at police and bystanders. Judge Jensen recognized this truth when he discussed the obvious exigencies of the situation: "It could be argued that the officers would have been remiss in their duties had they not formed a perimeter to contain Quade's movement, and to remove persons from the area where they could be shot, after Quade threatened armed response." One of the officers described the situation as follows:

> A. As best I can recall, after I explained my reason for being there, that I was a police officer and wanted to come in the house and fix the pipes and he should let us in, he said, "I'm going to get my gun and use it."
>
> . . . .

The majority also misconstrues my argument by extending it to all undercover cases. My claim, however, is narrower: the police may enter without an arrest warrant if a felony is *contemporaneously* committed in their presence.

Q. What was your understanding who he was going to use it on?

A. Well, certainly anybody who entered the house or anybody who was in front of the house.

Q. Then what happened?

A. And I believed him, and I retreated.

Q. Then what did you do?

A. I went down and I informed Officer Gough of the conversation, and I decided that we needed more help, specialized help.

Q. Okay. So what did you do?

A. We contacted – Officer Gough I believe contacted Headquarters by radio and asked for tactical units and negotiations units.

. . . .

Q. Would you explain, please, why the threat of a gun would be enough to consider the person in the house for a 5150 [mental health] evaluation?

A. Because he may shoot himself, he may shoot a police officer, he may shoot anybody in the community.

Q. And that isn't even taking into account the debris in the house.

A. That is correct.

Q. What happened next?

A. We closed off the street so pedestrians wouldn't walk in front of the house and cars would not drive by, and we waited for the specialized units to come and assist us.

To argue that the threatened introduction by Mr. Quade of a firearm into these urban circumstances doesn't create an exigency is to ignore late twentieth century reality.

The exigent circumstances Mr. Quade created and the dangerous felony behavior he displayed gave the police an additional justification for their response to this precarious situation. In *Warden v. Hayden*, 387 U.S. 294, 298-99, 87 S.Ct. 1642, 1645-46, 18 L.Ed.2d 782 (1967), the Court held that exigent circumstances justified warrantless entry into a house to search for an armed robbery suspect and weapons because delay would endanger lives of officers and citizens. *See also United States v. Santana*, 427 U.S. 38, 42-43, 96 S.Ct. 2406, 2409-10, 49 L.Ed.2d 300 (1976) (warrantless search justified by exigent circumstances); 2 LaFave, *supra*, § 6.1(f), at 600-02 (exigent circumstances justifying warrantless entry should be determined "by distinguishing the truly 'planned' warrant from the arrest which is made in the course of an ongoing investigation in the field"). Based on exigent circumstances, the police here had the authority to do exactly what they did – go into the house and arrest Mr. Quade.

The second Circuit's decision in *United States v. Crespo*, 834 F.2d 267 (2d Cir.1987), *cert. denied*, 485 U.S. 1007, 108 S.Ct. 1471, 99 L.Ed.2d 700 (1988), is right on point. In that case, federal agents concealed themselves while an informant went to defendant's door. The informant asked the defendant why he had been threatening her. The defendant responded: "I have nothing to do with you, but my people will deal with you." *Id.* at 269. Believing a crime had been committed in their presence, the agents broke into defendant's residence and arrested him

without a warrant. The Second Circuit upheld the warrantless entry based on exigent circumstances. The court noted: (1) defendant committed a serious offense by threatening a federal informant; (2) the agents reasonably believed defendant might be armed; (3) the agents had probable cause to believe the defendant committed a crime because he committed it in their presence; and (4) the agents knew defendant was in the residence because they observed him retreat into his apartment. *Id.* at 270-71. Because the same factors are present in this case, I would follow *Crespo* and hold that exigent circumstances existed.

I also note that the California Penal Code provides:

> Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape *or to overcome resistance.*
>
> A peace officer who makes or attempts to make an arrest *need not retreat or desist from his efforts* by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer . . . lose his right to self-defense by the use of reasonable force to effect the arrest . . . or to overcome resistance.

Cal.Penal Code § 835a (West 1985) (emphasis added).

Because the police officers in this case had a forcible entry warrant and were met with the threat of armed resistance and behavior patently creating exigent circumstances, *Payton* is inapposite and yields to *Warden v. Hayden* and *United States v. Crespo.*

The majority asserts that the officers "wisely eschewed" the exigency argument because it was not supported by the facts. The majority relies on Captain Hettrich's alleged statement that Mr. Quade wasn't "necessarily dangerous" and that the decision to enter the home was motivated, at least in part, by a desire to not keep traffic blocked all day. First, whether or not the officers subjectively believed exigent circumstances existed is irrelevant. We must determine *objectively* whether exigent circumstances existed. *Cf. Florida v. Royer*, 460 U.S. 491, 507, 103 S.Ct. 1319, 1329, 75 L.Ed.2d 229 (1983) ("[T]he fact that the officers did not believe there was probable cause . . . would not foreclose the State from justifying [defendant's] custody by proving probable cause. . . . "). Second, the majority's reliance on Captain Hettrich's alleged statement is troubling. The statement was not before the district court when it granted summary judgment on the unlawful entry issue. The statement was only quoted in a Supplemental Brief and Trial Memorandum filed *after* the district court ruled on plaintiff's *Payton* claim. Apparently, the statement is taken from a videotape of Captain Hettrich's press briefing. I think it is highly improper to reject the existence of exigent circumstances based on the subjective impressions of one officer whose statements are not properly before this court.

Therefore, I conclude it is *impossible* to claim, as does the majority, that under these circumstances the Constitution of the United States required the police to withdraw when Mr. Quade said he was arming himself and to secure an arrest warrant before they could go into his

house to arrest him and conduct the authorized inspection. It takes many hours to secure an arrest warrant. The fanciful ideal that somehow a magistrate might have diffused this situation is thoroughly unrealistic. Based on over 20 years of securing arrest warrants, I cannot conceive of a magistrate taking over this emergency and withholding an arrest warrant. Such foolhardy action would only extend the exigency and delay its resolution.

D. The police officers had a forcible entry inspection warrant. Mr. Quade committed felonies in their presence. Mr. Quade's threatened armed resistance endangered the officers, the general public, and Quade himself. Separately, each of those facts probably authorized the entry into Mr. Quade's home without an arrest warrant. Together, their combined force is irrefutable.

I defy the majority to declare what legitimate Fourth Amendment purpose is served by their holding that was not already served when the magistrate authorized a forcible entry and inspection of Mr. Quade's home. All the law I can find indicates that what the City did was not only within the limits of permissible behavior, but followed the prescriptive requirements of the Supreme Court and the Constitution in all material respects. Retreating to the chambers of a magistrate for a third time and securing an arrest warrant would not have altered Mr. Quade's behavior one whit. If the police had returned with an arrest warrant, Mr. Quade would still have been waiting for them, with his gun.

Not only was it *not* clearly established that the police could not do what they did, but indeed, the law was solidly on their side. In my judgment, the law is so clearly

on their side that we do not even reach the question of qualified immunity on this issue.[5] When measured by the appropriate standards, the defendants' conduct was perfectly constitutional.

II

It follows from my conclusion that because the police's entry into Mr. Quade's home was lawful and reasonable, the force they used when he pointed his gun at them was reasonable as a matter of law. The majority discounts the danger posed by an armed, urban, barricaded recluse threatening to shoot police and city inspectors. This claim is, with all respect to my colleagues, monumentally mistaken. Anyone who has ever been involved in such a situation knows how dangerous it is. If my colleagues and I were in the area, we would run like blazes for cover when Mr. Quade mentioned a firearm, or certainly hide behind something bulletproof. Surely my colleagues wouldn't suggest everybody should have just gone away and left Mr. Quade alone. Would *we* blithely walk up to Mr. Quade's door to serve the arrest warrant the majority says should have been secured? Of course not. The situation was terribly precarious. We *judges* don't go out to serve the warrants we order executed. We ask

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[5] The majority believes the law "clearly established" the need for the police to secure an arrest warrant before entering Mr. Quade's home, despite the fact that two of the four federal judges who have considered the issue would rule that an arrest warrant was not required. I suppose police officers on the beat are required to have a better appreciation of Fourth Amendment jurisprudence than Judge Jensen and I.

the police to do it for us. Telling the police that this situation was not dangerous would be laughable if it were not so deadly serious.

Both the majority and the plaintiff concede that once Mr. Quade pointed his gun at the police and pulled the trigger, the officers acted reasonably by shooting Quade in self-defense. In fact, the police showed tremendous self-restraint after they entered Quade's home. Quade pointed the gun at the police and panned it back and forth across the officers' faces. The police responded by ordering Quade repeatedly to drop the gun. Quade then said, "I told you I was going to use it." Still, the police held their fire. In fact, the police did not shoot Quade until he *pulled the trigger twice!*

The unchallenged declaration of the lieutenant in charge of San Francisco Police Department's Tactical Squad is dispositive on this issue:

> The San Francisco Police Department's standing order on the use of force indicates that we could have shot Quade as soon as he pointed the gun at us and became a threat to the officers. We were risking our lives by not firing immediately, but we did not want to shoot him. Once he pulled the trigger, he gave us no choice.

So, if the shooting itself is not unreasonable, where's the excessive force? The majority says "[t]he force which was applied must be balanced against the *need* for that force." To make that determination, the majority again mistakenly applies a subjective analysis, asserting that the officers' purpose for entering Mr. Quade's residence somehow determines whether the force was reasonable. But according to *Graham v. Connor*, 490 U.S. 386, 397, 109

S.Ct. 1865, 1872-73, 104 L.Ed.2d 443 (1989) (internal quotations omitted), "the reasonableness inquiry in an excessive force case is an *objective* one: the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."

The entry was either lawful or unlawful; I think it was, the majority thinks it wasn't. Once inside the house, however, the police certainly did not violate the Constitution by defending themselves when Quade pulled the trigger of his revolver. Deploying a SWAT team when Mr. Quade threatened to shoot a police officer certainly seems reasonable. I just don't see an excessive force claim separate from the unlawful entry claim. Does the majority really want to take issue with the particular tactics used by the police to enter Quade's home? Should we decide how many hours of negotiations must take place before the police can disarm an armed, mentally unstable recluse? Should we determine tactical methods of entry?

Such a posture converts members of the judicial branch of government into tactical managers of the police. The court did its job by ordering Mr. Quade's privacy to yield. It was then the police's job to effectuate an entry on behalf of the health inspectors. Judge Kozinski harbors a view of the magistrate/peace officer relationship that is not only unrealistic, but inappropriate. As a practical matter, we judges are ill-equipped (although sometimes we don't think so) to make tactical decisions, especially when weapons are involved and lives are at stake. Anyone who has ever spent time in the field understands how foolhardy it would be for judges, or even prosecutors, to attempt to tell the police how to

flush out an armed, barricaded subject. Experienced peace officers understand the necessity of resolving such a situation as quickly as feasible. Leaving Mr. Quade alone would create not only an unacceptable danger for anyone who must then approach his house, it would also continue to put Mr. Quade in danger of injuring himself. The majority may be prepared to second-guess these tough decisions. I am not.

Ironically, the plaintiff says the police should have used tear gas or police dogs to discharge their quarry from his home. I didn't know we used tear gas and police dogs to attack people who are not dangerous. Moreover, in other cases in our circuit, we're told that police dogs constitute deadly force.

CONCLUSION

The majority's opinion leaves the law in disarray. In my view, the holdings of this case are at war with (1) Supreme Court and circuit precedents, (2) the Fourth Amendment's standard of reasonableness, (3) the law of qualified immunity, and (4) our responsibility as judges to maintain a body of law upon which executive branch members can rely in doing their work.

If I were a police officer, I might reconsider my calling with this kind of misunderstanding of my job and inconsistent messages from the court. As I read this record, it requires summary judgment for the defendants, across the board. Thus, I respectfully dissent.

APPENDIX B

JULIA ALEXANDER, AS EXECUTOR OF THE ESTATE OF HENRY O. QUADE, JR. deceased, Plaintiff, v. CITY AND COUNTY OF SAN FRANCISCO, et. al., Defendants.	No. C-91-1338-DLJ **ORDER** (Filed Sept. 3, 1992)

On September 1, 1992 the Court heard plaintiff's motion for partial summary judgment and defendants' motion for summary judgment. Montie J. Stegen appeared for plaintiff. Deputy City Attorney Jean S. Fraser appeared for defendants. Having considered the papers submitted, the arguments of counsel, the applicable law, and the entire record herein, the Court DENIES plaintiff's motion for partial summary judgment and GRANTS IN PART, DENIES IN PART, and DEFERS RULING ON IN PART, defendants' motion for summary judgment, for the following reasons.

I. BACKGROUND

A. Factual background.

Decedent Henry Quade, Jr. resided at 614 18th Avenue in San Francisco. In June 1990 Quade's neighbors complained to the San Francisco Department of Public

Health ("Health Department") about foul odors and collection of debris on Quade's property. The Health Department attempted, without success, to contact Quade regarding the problems. A Health Department inspector observed sewage leaking from the garage on the property, algae on the garage door, garbage piled high throughout the property, and a foul odor emanating from the house. The Health Department made referrals to social service agencies due to the concern about Quade's mental and physical health.

In September 1990 the Health Department obtained an administrative inspection warrant for Quade's premises. The Health Department served the warrant on Quade, but Quade did not respond. The Health Department subsequently applied for a forcible entry administrative inspection warrant pursuant to Cal. Civil Proc. Code § 1822.56. The Municipal Court of San Francisco County issued the forcible entry warrant on October 3, 1990.

On the morning of October 16, 1990 the Health Department attempted to execute the warrant with the assistance of the San Francisco Police Department. Police officers announced their presence but received no response from Quade. A locksmith was unsuccessful in entering the home because the door had been nailed shut. Sergeant Richard Heller then moved aside a piece of cardboard covering a window and announced his presence. Quade refused to let the police in and stated: "I'm going to get my gun and use it."

Sergeant Heller radioed for additional police officers, including the tactical squad. Police officers cordoned off

the area surrounding Quade's home. A hostage negotiation team attempted for almost one hour to contact Quade, but received no response. Defendant Captain John Willett, one of the police Captains at the scene, directed the tactical squad to formulate a plan to enter the residence and apprehend Quade. Lieutenant Joaqin Santos and Sergeant David Shinn, both members of the tactical squad, helped to develop such a plan.

Just before noon, Captain Willett order the tactical squad to enter the residence. Officers Edward St. Andre and Nicholas Borthne used a battering ram to open the door, but these officers did not immediately enter the residence. Tactical squad members David Seid, Richard Lee, Bernard Sullivan, David Shinn, Joaquin Santos, and Matthew Castagnola then entered the premises. Neither Seid nor Santos had their weapons drawn upon entry. Quade appeared at the top of the staircase and pointed a loaded handgun at the officers. The officers ordered Quade to drop the gun. Quade continued to point the gun and stated: "I told you I was going to use it." Quade then pulled the trigger, but the gun did not fire. Sergeant Shinn and Officer Lee, and perhaps other members of the tactical squad, opened fire, killing Quade.

B. Procedural background.

Plaintiff Julia Alexander, the executor of Quade's estate, filed the instant action on May 3, 1991. Plaintiff filed an amended complaint on October 2, 1991. Plaintiff's first claim is for liability pursuant to 42 U.S.C. § 1983. This single claim presents essentially three theories for liability under the Fourth Amendment. First,

plaintiff claims that the defendant police officers at the scene unlawfully arrested Quade in his home without a warrant. Second, plaintiff claims that the defendant police officers used unreasonable force in seizing Quade by deadly force. Third, plaintiff alleges that defendant City and County of San Francisco is liable because of failure to train or failure to supervise the police officer defendants.

Plaintiff originally asserted a § 1983 claim against defendant Health Department officials Richard Cunningham and Albert Chinn for allegedly failing to inspect the sewer line and for making improper requests for administrative warrants. Plaintiff also asserted claims against all defendants under the California Constitution and state tort law. Defendants moved for summary judgment on all claims. However, plaintiff now elects to proceed exclusively under the § 1983 claim regarding police conduct, and concedes summary judgment as to all other claims. *See* Plaintiff's Memorandum In Opposition To Defendants' Motion For Summary Judgment, filed August 19, 1992, at 1. Plaintiff moves for summary judgment on the issue of whether defendants unlawfully arrested Quade.

This case is set for a pretrial conference on September 9, 1992 and trial on September 14, 1992.

II. LEGAL STANDARD FOR SUMMARY JUDGMENT

Under Rule 56(c) of the Federal Rules of Civil Procedure, a district court may grant summary judgment when "the pleadings depositions, answers to interrogatories, and admissions on file, together with affidavits, if

any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

Recognizing that summary judgment motions can contribute significantly to the resolution of litigation when there are no factual issues, the Supreme Court and the Ninth Circuit have established the following standards for consideration of such motions: "If the party moving for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrates the absence of any genuine issues of material fact," the burden of production then shifts so that "the non-moving party must set forth, by affidavit or as otherwise provided in Rule 56, *'specific facts* showing that there is a genuine issue for trial.' " *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (quoting Fed. R. Civ. P. 56(e) (emphasis added) and citing *Kaiser Cement Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 1100, 1103-04 (9th Cir.), *cert. denied*, 107 S. Ct. 435 (1986) and *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1986)). With respect to these specific facts offered by the non-moving party, the court does not make credibility determinations or weigh conflicting evidence, and is required to draw all inferences in a light most favorable to the non-moving party. *T.W. Elec. Serv.*, 809 F.2d at 630-31 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986)).

Rule 56(c) nevertheless requires this Court to enter summary judgment, "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will

bear the burden of proof at trial." *Celotex*, 106 S. Ct. at 2552. The mere existence of a scintilla of evidence in support of the non-moving party's position is insufficient: "[T]here must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2512 (1986). This Court thus applies to either a defendant's or plaintiff's motion for summary judgment the same standard as for a motion for directed verdict: "[W]hether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.*

III. DISCUSSION

A. Unlawful arrest.

Plaintiff claims that the defendant police officers unlawfully arrested Quade in his home without a warrant and without probable cause. Plaintiff contends that police officers arrested Quade in his home when they cordoned off the area and surrounded the home with armed officers.

The Ninth Circuit has held that it is possible for police to arrest a suspect in his home without even entering the home. *United States v. Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 2255 (1986). In *Al-Azzawy* police surrounded a suspect's trailer home with weapons drawn and ordered the suspect to leave the trailer. The suspect complied and was handcuffed outside of the trailer. Police possessed neither an arrest warrant for the suspect nor a search warrant for the trailer home. The Ninth Circuit held that the police unlawfully arrested the

suspect in his home without a warrant because, given the overwhelming show of force, the suspect was not free to leave and the suspect emerged from the trailer only as the result of extreme coercion. *Id.* at 893.[1]

Plaintiff contends that the instant case is analogous to *Al-Azzawy* in that armed police officers surrounded Quade's home, in part, to prevent Quade from leaving the premises. Plaintiff's claim of unlawful arrest on this theory is subject to summary judgment for a number of reasons.

1. Viability of Al-Azzawy.

First, the viability of the holding in *Al-Azzawy* is, at best, questionable in light of the subsequent Supreme Court opinion in *California v. Hodari D.*, 111 S. Ct. 1547, 1550-51(1991) ("An arrest requires *either* physical force . . . *or* where that is absent, *submission* to the assertion of authority . . . 'There can be no arrest without either touching or submission' ") (emphasis in original). In this case, plaintiff neither submitted, nor was he ever taken into custody by physical force, prior to the moment officers entered the residence.

2. Factual distinction.

Second, assuming that *Al-Azzawy* is good law, there is no evidence in this record that police officers actually

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[1] The Ninth Circuit upheld the subsequent search of the trailer home, however, on grounds of exigent circumstances. 784 F.2d at 895.

ordered Quade to exit his home and submit to arrest. This fact was important to the holdings of *Al-Azzawy*. 784 F.2d at 893. Moreover, Quade never exited his residence and never submitted to police custody. In *Al-Azzawy* there was a physical arrest and the issue before the court was whether or not that arrest was lawful. *Al-Azzawy* is not a holding, on its facts, that forming a cordon is a completed arrest and, upon analysis, it is clear that it cannot be. A formed cordon can be unformed without anyone being taken into custody and it is beyond logic to find that someone has been arrested under such circumstances. Even if the cordon is formed for the purpose of accomplishing an arrest of someone within the cordon, the result is the same. The act itself, without a subsequent custodial taking, is not an arrest. *Hodari D.* applies to this fact situation – not *Al-Azzawy*. The evidence in this case shows that Quade was not arrested.

3. Evidentiary showing.

Third, plaintiff concedes that there is no evidentiary basis showing which, if any, of the defendant officers formed the cordon. At best, plaintiff argues that there is undisputed evidence showing that defendant Captains Hettrick and Willett ordered formation of the cordon.

4. Qualified immunity.

Fourth, even assuming that the act of forming the cordon constituted an unlawful arrest, the responsible defendants are entitled to qualified immunity on this claim. Police officers performing discretionary functions

are entitled to qualified immunity unless their conduct violates "clearly established statutory or constitutional rights" of which a reasonable officer would have known. *Harlow v. Fitzgerald,* 102 S. Ct. 2727, 2738 (1982). Whether an officer is entitled to qualified immunity turns on the "objective legal reasonableness" of the action. *Anderson v. Creighton,* 107 S. Ct. 3034, 3038 (1987). The test in this case is whether a reasonable police officer could have believed the formation of the cordon was lawful, in light of clearly established law and the information the officer possessed at the time. *Id.* at 3040.

Plaintiff argues that the need for an arrest warrant for an arrest in the home is clearly established law, and thus the defendants' actions could not have been objectively reasonable. However, both the Supreme Court and the Ninth Circuit have soundly rejected such a broad statement of the legal principle at issue. *Anderson,* 107 S. Ct. 3039; *Thorsted v. Kelly,* 858 F.2d 571, 573-74 (9th Cir. 1988). The issue instead is whether it is clearly established law that the formation of a cordon for the purpose of accomplishing an arrest constitutes an unlawful warrantless arrest of a person in the home, who is never taken into custody. Clearly it is not.

In many instances, it is entirely appropriate and lawful for police to establish a cordon or an armed perimeter around a structure, even where the police possess neither an arrest or search warrant. These instances arise most often in the face of exigent circumstances, for example, where an occupant threatens to flee or poses a danger to others outside of the structure. Although defendants do not argue exigent circumstances with respect to the

instant motions, the officers in this action were confronted with an occupant who claimed to be armed and threatened to harm the officers if they entered. It could be argued that the officers would have been remiss in their duties had they not formed a perimeter to contain Quade's movements, and to remove persons from the area where they could be shot, after Quade threatened armed response.

As noted above, *Al-Azzawy* could be read to hold that an arrest in the home takes place only where the police order the suspect out of the home, the suspect complies, and the police take the suspect into custody. The holding of *Hodari D.* simply confirms that the law on this issue was anything but settled when the officers acted. Given Quade's threat of armed response, the decision to form a cordon was objectively reasonable.

5. Lawful detention.

Finally, even assuming the continued viability of *Al-Azzawy* and no qualified immunity, the instant case is distinguishable from *Al-Azzawy* in one important respect; police officers had authority to enter Quade's residence pursuant to the administrative warrant.

The inspection warrant in this case authorized any authorized health inspector to "arrange and conduct a complete inspection" of Quade's property for the purpose of discovering if the property complied with certain codes and regulations. *See* Forcible Entry Warrant, attached as Ex. F to Exhibits in Support of Defendant's Motion For Summary Judgment (filed August 5, 1992).

The warrant also authorized inspection by means of forcible entry. *Id.*; Cal. Civ. Proc. Code § 1822.56.

Health Department officials sought the assistance of San Francisco police officers in executing the warrant. Plaintiff makes no suggestion that it was improper for police officers to accompany Health Department officials in executing the warrant. At least one California court has assumed, without explicitly stating, that it is perfectly permissible for police officers to accompany inspection officials in executing an administrative warrant. *People v. Tillery*, 211 Cal. App. 3d 1569, 1574 (1989) (because of occupant's-reputation for violence and presence of pit bulls, uniformed police officers accompanied inspector). In fact, the court in *Tillery* stated that the notice provisions of the statute authorizing forcible entry are designed to prevent a "violent confrontation between the *police* and the occupier of the premises to be inspected." *Id.* at 1578 (emphasis added). Thus the police officers in this case had authority, pursuant to the forcible entry warrant,[2] to enter Quade's residence for the purpose of making the premises safe for Health Department officials.

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[2] Plaintiff argues that the forcible entry warrant does not necessarily permit entry over the objection of the occupant, but merely permits breaking a window or other similar act to secure entry in the absence of the occupant. However, the comment in *People v. Tillery*, that the notice provisions of the statute authorizing forcible entry are designed to prevent a violent confrontation between police and occupant, suggests that police may use force to enter over the objection of an occupant. 211 Cal. App. 3d at 1578. *See also* 3 W. LaFave, *Search and Seizure*, § 10.1(e), 620 and n.97 (1987) (occupant's refusal to permit entry pursuant to administrative inspection warrant may be overcome by force).

Given this premise, defendants argue that police officers lawfully detained Quade for purposes of executing the warrant in a safe manner. Defendants analogize from *Michigan v. Summers*, 101 S. Ct. 2587 (1981) in which the Supreme Court held that police officers may detain the occupants of a premises during a search for contraband pursuant to a search warrant. *Id.* at 2595. One justification contributing to the holding was the important "interest in minimizing the risk of harm to the officers" executing the search warrant. *Id.* at 2594. The Supreme Court noted that the risk of harm to both police officers and occupants of a premises subject to a search warrant "is minimized if the officers routinely exercise unquestioned command of the situation." *Id.* (citing 2 W. LaFave, *Search and Seizure*, § 4.9, 150-51 (1978)).

It is true that *Summers* is premised on the fact that the police had a warrant to search the premises for contraband, 101 S. Ct. at 2593, rather than an administrative warrant. This distinction would be more important if police sought to detain an occupant during an administrative inspection for reasons other than safety. For example, other justifications contributing to the holding in *Summers* were the interest in preventing flight in the intent incriminating evidence is found and the interest in orderly completion of the search. *Id.* at 2594. However, the need to secure the safety of officials executing a warrant is no less important in the context of an administrative warrant rather than a search warrant. Thus under the reasoning of *Summers* police officers may detain an occupant of a premises during an administrative inspection where necessary to ensure the safety of the inspection officials or the officers themselves.

Police officers in this case arrived at Quade's residence with the legal authority to enter the premises for the benefit of Health Department officials. Moreover, upon receiving no initial response from Quade after announcing their presence, the officers could have forcibly entered the premises immediately. Had Quade confronted the officers with a gun, they undoubtedly could have seized him. However, here the officers summoned the assistance of a locksmith before attempting forceful entry. Quade then threatened to use a gun against anyone attempting to enter. Police officers retreated and formed a cordon to both protect third parties and to prevent Quade from leaving. These steps constitute safety measures to protect against harm in the course of executing the administrative warrant. In effect, the officers detained Quade for safety reasons.

Plaintiff would have the Court conclude that, because the officers retreated rather than entered immediately to ensure the premises were safe for inspection, the officers somehow converted their lawful right to enter into an unlawful arrest. Such a decision would encourage police officers to act impulsively to preserve their lawful right of entry, rather than carefully to ensure the safety of the officers, the occupants, and the inspection officials.

The undisputed facts in this case show that any detention of Quade by officers in the course of executing the administrative inspection warrant was lawful, as it was reasonably necessary to ensure the safety of the inspection officials and the officers. For this reason, and the reasons stated above, the Court will grant defendants' motion for summary judgment on plaintiff's claim for unlawful arrest.

The unlawful arrest claim was the only possible basis for liability against the police officers who neither participated in the entry of the premises, nor participated in making the decision to enter. Those defendants falling within this category are James Dachauer, Patrick White, Joseph Kennedy, Richard Heller, and Steven Gough. Accordingly summary judgment will be granted in favor of these defendants.

B. Unreasonable force.

Plaintiff next claims that the police officers used unreasonable force in seizing Quade by deadly force. A claim of excessive force, including deadly force, must be analyzed under the reasonableness standard of the Fourth Amendment. *Graham v. Connor,* 109 S. Ct. 1865, 1872 (1989). The test is whether officers' actions are " 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.*

> The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.

Id. Police officers may use deadly force only where they have "probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner,* 105 S. Ct. 1694, 1697 (1985).

1. Force at time of shooting.

Traditionally, an excessive force claim consists of a showing that the amount of force used by the officer actually employing the force, was objectively unreasonable. It is not clear whether plaintiff is proceeding on this theory. It is undisputed that when the officers entered Quade's residence, Quade pointed a loaded gun at the officers and pulled the trigger.[3] Plaintiff seems to concede that the officers who actually entered the residence and fired at Quade could not be liable under § 1983 for their actions because they had probable cause to believe that Quade posed a significant threat of death or serious physical injury to the officers. However, to the extent that plaintiff does not concede this issue, the Court will grant plaintiff leave to specifically identify what evidentiary basis would prevent summary judgment as to this theory of the excessive force claim. The parties may address this issue at the pretrial conference, in accordance with the instructions at the conclusion of this Order.

Even if plaintiff can make such an evidentiary showing, the only defendants that could possibly be liable under such a theory are those defendants that actually

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[3] Plaintiff concedes that, although she can prove that the officers are responsible for Quade's homicide, she cannot present evidence to contradict the officers' version of the events in Quade's home that establish the homicide as justifiable. Nevertheless, plaintiff argues that summary judgment should be denied so that she can attempt to impeach the officers at trial. This argument has no merit. *See National Union Fire Insurance Co. v. Argonaut Insurance Co.*, 701 F.2d 95, 97 (9th Cir. 1983) ("neither a desire to cross-examine an affiant nor an unspecified hope of undermining his or her credibility suffices to avert summary judgment").

shot Quade. On the current record, it is undisputed that the following remaining defendants did not fire their weapons during the incident: Michael Lennon, Timothy Hettrick, John Willett, Joaquin Santos, David Seid, Edward St. Andre, and Nicholas Borthne. To the extent that plaintiff wishes to proceed on this theory, she should also identify the evidentiary basis for showing which defendant(s) actually shot Quade.

2. *Events Preceding shooting.*

As a second theory for the excessive force claim, plaintiff argues that events leading up to the confrontation in Quade's residence rendered the use of deadly force objectively unreasonable. The crux of plaintiff's argument is that the officers should have used alternative less dangerous means, for example, tear gas or canine tactics, before confronting Quade under circumstances where the need for deadly force was a foreseeable outcome. Plaintiff argues that the failure to use tactics which could lessen the possibility of a deadly force confrontation was objectively unreasonable because Quade did not pose an immediate threat to the officers or others until the officers forcibly entered the house and because there was no danger of Quade attempting to evade arrest by flight from his residence.

Defendants argue that a claim that officers merely failed to utilize less threatening tactics cannot constitute a successful claim for excessive force in violation of the Fourth Amendment. Defendants rely on *Brandenburg v.*

Cureton, 882 F.2d 211 (6th Cir. 1989). In *Brandenburg* officers attempted to serve a stay away warrant on an individual and ended up killing him when he attempted to reach for a gun. The evidence at trial showed that the officers made no specific preparation for serving the warrant. The deceased's wife (plaintiff) argued that poor tactical preparation put the officers in a position in which the confrontation unnecessarily escalated into the need for deadly force. The Sixth Circuit rejected this argument, holding that plaintiff's claim was for mere negligence and that, at worst, "the officers did not consider all of the alternatives available to them." *Id.* at 214.

Defendants seize upon this quotation and argue that the failure to utilize less threatening tactics cannot give rise to a civil rights claim. However, the significance of *Brandenburg* to the instant case is questionable for at least two reasons. First, *Brandenburg* was argued prior to the Supreme Court's decision in *Graham v. Connor*, and although decided after *Graham*, makes no mention of *Graham*. Thus the Sixth Circuit's holding in *Brandenburg* that the officers' conduct constituted nothing more than negligence, failed to take into account the objective reasonableness test set forth in *Graham*. Second, plaintiff overstates the significance of *Brandenburg*. The theory in the instant case is not that the officers bungled the mission, creating an unnecessarily dangerous situation, but rather that officers consciously chose to proceed with high risk tactics without attempting available less threatening tactics.

The Court will invite further briefing and argument on whether this second theory of excessive force liability is cognizable under § 1983. Moreover, to the extent that

the claim is cognizable, the court will grant plaintiff leave to specifically identify what evidentiary basis would prevent summary judgment as to this theory of the excessive force claim.

At the hearing on the instant motions, plaintiff's counsel conceded that the only defendants that could be liable on this second excessive force theory are Commander Michael Lennon, Captain Hettrick, and Captain John Willett. These defendants allegedly made the decisions regarding what tactics to use. Thus the Court will grant summary judgment in favor of those defendant officers that could not possibly be liable under either theory of excessive force. Those defendants are: Joaquin Santos, David Seid, Edward St. Andre, and Nicholas Borthne.

3. *Qualified immunity.*

Defendants also claim qualified immunity on the claim for excessive force. Because the analysis of qualified immunity necessarily involves an inquiry into whether the claimed theory of unreasonable force is clearly established law, the Court reserves ruling on this defense pending the supplemental briefing and argument on the other issues addressed above.

C. *Monell Claim.*

Plaintiff argues in her opposition brief that summary judgment as to the *Monell* claim is premature because of incomplete discovery. However, it now appears that

plaintiff received substantially all of the requested discovery, absent Frank Jordan's interrogatory answers and citizen complaint files regarding certain officers. Accordingly, the Court will grant plaintiff leave for supplemental briefing on her opposition to the motion for summary judgment on the *Monell* claim. To the extent that plaintiff argues that she still lacks sufficient discovery, plaintiff shall make a proffer of the anticipated content of the missing discovery and explain how such evidence should prevent summary judgment as to the *Monell* claim.

D. *Defendant Frank Jordan.*

Plaintiff alleges liability of defendant Frank Jordan (then Chief of Police) in both his official capacity and individually. To the extent Jordan's actions in his official capacity contributed to a § 1983 violation, the City and County of San Francisco, and not Jordan, are liable. Plaintiff's theory of Jordan's individual liability is premised on the assertion that Jordan appointed Commander Michael Lennon with background. While there currently is no evidentiary basis for such an assertion, even assuming its truth, the assertion is insufficient to impose individual liability on Jordan.

To support a claim for individual liability of a supervisor, plaintiff must show that the supervisor's failure to train or to supervise personnel, or the supervisor's establishment of a policy proximately caused the deprivation of a constitutional right. *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 680-81 (9th Cir. 1984). The mere showing of a constitutional violation is insufficient to raise an issue of fact regarding such a claim. *Id.* In this

case, plaintiff's allegations amount to no more than a claim that Jordan negligently "hired" personnel. Such a claim is not sufficient to confer individual liability on Jordan under § 1983. Accordingly, the Court will grant summary judgment in favor of defendant Frank Jordan insofar as plaintiff seeks to hold Jordan individually liable.

IV. CONCLUSION

For the foregoing reasons, the Court ORDERS as follows:

1. Plaintiff's motion for summary judgment on the unlawful arrest claim is DENIED;

2. Defendants' motion for summary judgment on the second and third causes of action in the First Amended Complaint is GRANTED;

3. Defendants' motion for summary judgment on plaintiff's § 1983 claim for unlawful arrest is GRANTED;

4. Summary judgment on all claims is GRANTED in favor of defendants Richard Cunningham, Albert Chinn, Joaquin Santos, David Seid, Edward St. Andre, Nicholas Borthne, James Dachauer, Patrick White, Joseph Kennedy, Richard Heller, and Steven Gough;

5. Summary judgment is GRANTED in favor of defendant Frank Jordan insofar as plaintiff seeks to hold Jordan individually liable;

6. The Court DEFERS RULING on defendants' motion for summary judgment on plaintiff's unreasonable force and *Monell* claims. The parties may address the

unresolved issues, set forth in the body of this Order, at the pretrial conference on Wednesday September 9, 1992 at 10:00 a.m. To the extent that the parties wish to submit written briefs and further evidentiary documents on these issues, the parties shall file such documents at or before 12:00 p.m. on Tuesday September 8, 1992. The parties shall also deliver an extra copy of the documents directly to chambers on the seventeenth floor.

IT IS SO ORDERED.

Dated: September 3, 1992.

/s/ D. Lowell Jensen
D. Lowell Jensen
United States District Judge

APPENDIX C

JULIA ALEXANDER, AS EXECUTOR OF THE ESTATE OF HENRY O. QUADE, JR. deceased Plaintiff v. CITY AND COUNTY OF SAN FRANCISCO, et al., Defendants.	No. C-91-1338-DLJ **ORDER** (Filed Sep. 11, 1992)

On September 9, 1992 the Court heard supplemental argument on defendants' motion for summary judgment. Montie J. Stegen and Peter Kagel appeared for plaintiff. Deputy City Attorneys Jean S. Fraser and Barron L. Wienstein appeared for defendants. Having considered the papers submitted, the arguments of counsel, the applicable law, and the entire record herein, the Court GRANTS defendants' motion for summary judgment, for the following reasons.

I. BACKGROUND

The background of this action is set forth more fully in the Court's prior Order, and is expressly incorporated herein. *See Alexander v. City and County of San Francisco,* Civ. No. 91-1338-DLJ, Order (N.D. Cal. September 3, 1992) ("Order"). Plaintiff now elects to proceed solely on her § 1983 claim against defendants Commander Michael Lennon, Captain Timothy Hettrick, and Captain John Willett – and her *Monell* claim against the City and

County of San Francisco ("City"). *See* Plaintiff's Supplemental Brief And Trial Memorandum, 1:6-18.[1] Plaintiff contends that the individual defendants are liable because they formulated, adopted, and directed the police plan to forcibly enter Quade's residence, which conduct caused a violation of Quade's right to be free from excessive force. Plaintiff also contends that the City is liable under *Monell* for failing to train Commander Lennon for barricaded subject scenarios, and for failing to supervise Captain Willett regarding the use of excessive force. Defendants move for summary judgment on all claims.

II. DISCUSSION

A. *Qualified immunity.*

1. *Legal standard.*

Under the doctrine of qualified immunity, police officers "performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable [police officer] would have known." *Harlow v. Fitzgerald*, 102 S. Ct. 2727, 2738 (1982). However, even in the face of a clearly established constitutional right, police officers are entitled to qualified immunity if a reasonable police officer could have believed that the conduct involved was legal, *Anderson v. Creighton*, 107 S. Ct. 3034, 3038-39 (1987). Thus the

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[1] Accordingly plaintiff concedes summary judgment in favor of all other remaining defendants: Matthew Castagnola, Bernard Sullivan, Richard Lee, and David Shinn.

availability of qualified immunity depends upon the " 'objective legal reasonableness' of the action . . . in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson,* 107 S. Ct. at 3038 (1987) (quoting *Harlow,* 102 S. Ct. at 2738-39).

Development of the qualified immunity doctrine reflects a "balance between the evils inevitable in any available alternative." *Harlow,* 102 S. Ct. at 2736. On the one hand, claims for damages against police officers may "offer the only realistic avenue for vindication of constitutional guarantees." *Id.* On the other hand, unfounded claims against police officers impose costs on both the officers and society, including the expense of litigation, and the diversion of energy from legitimate police duties. *Id.; Anderson,* 107 S. Ct. at 3038. As a balance between these competing interests, qualified immunity is designed to permit "insubstantial" lawsuits to be terminated quickly. *Harlow,* 102 S. Ct. at 2736. Defendants bear the burden of establishing the defense of qualified immunity. *Benigni v. Hemet,* 879 F.2d 473, 479 (9th Cir. 1988).

2. *Application.*

The first issue is whether the right plaintiff claims to have been violated was clearly established at the time of Quade's death (October 16, 1990). Plaintiff claims a violation of Quade's Fourth Amendment right to be free from unreasonable seizures. In a most general sense, this right encompasses a right to be free from injury caused by excessive police force and has been clearly established in the law. However, the Supreme Court rejected such a broad level of generality for purposes of determining the

legal right at issue. *Anderson*, 107 S. Ct. at 3038-39 ("if the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*"). Instead, the Supreme Court described the level of generality to be used as follows:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the action in question has previously been held unlawful, . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson, 107 S. Ct. at 3039.

Case law on the application of qualified immunity to claims of excessive force is quite sparse. In its watershed case on the application of the Constitution to claims of excessive force by police, the Supreme Court declined to comment on the "proper application" of qualified immunity in excessive force cases. *Graham v. Connor*, 109 S. Ct. 1865, 1873 n.12 (1989). Even more sparse is guidance on how the Court should determine whether there is clearly established law with respect to an excessive force claim. The Ninth Circuit has addressed the first issue, whether qualified immunity constitutes a defense to excessive force claims, but has not examined whether the law is clearly established with respect to excessive force claims.

In *White v. Pierce County*, 797 F.2d 812 (9th Cir. 1986), the Ninth Circuit held that qualified immunity is a defense to a claim of excessive force. Although *White* was decided prior to *Graham* and *Anderson*, the Ninth Circuit

determined that the trial court properly decided the issue of reasonableness of force, when presented with a qualified immunity defense on summary judgment. *Id.* at 816. The Ninth Circuit made no mention of whether the law on excessive force was clearly established. In a more recent case, the Ninth Circuit reversed a grant of qualified immunity at summary judgment on an excessive force claim. *Barlow v. Ground*, 943 F.2d 1132, 1136 (9th Cir. 1991). The Ninth Circuit held that triable issues of fact about what occurred during the arrest prevented a determination of whether the officers' conduct was objectively reasonable. *Id.* Again, the Ninth Circuit did not address whether the law was clearly established at the time of the incident.

The lack of discussion about whether excessive force law is clearly established is somewhat understandable, given the traditional context in which such claims arise. In the "typical" excessive force claim, the plaintiff alleges that the defendant police officer who actually applied the force, did so unreasonably and unnecessarily. The legal standard to evaluate such a claim is rather straightforward: Was the officer's action objectively reasonable, in light of the facts and circumstances. *Graham*, 109 S. Ct. at 1872. As one commentator explained, "this is not an area of the law that involves a 'thicket' of legal opinions. While each case may present different facts, this well-established legal standard remains the same." Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. Pa. L. Rev. 23, 59 (1989).

Recognized excessive force claims are not limited to claims against the officer applying the force. An officer

that directs the use of unlawful force by another may be held liable as an aider and abettor. An officer who has the ability to do so, may also be held liable for failing to intervene and prevent the use of unlawful force by another. While these situations differ from the "typical" excessive force claim, and impose liability on officer's who do not actually apply force, the application of the reasonableness test is still relatively straightforward.

This case, however, is far from a "typical" excessive force claim. Here the Court has already determined that the tactical squad officers had a lawful right to forcibly enter Quade's residence. Moreover, plaintiff concedes that upon entering, the tactical squad officers were legally justified in using deadly force and acted reasonably in shooting Quade after he pointed a handgun at them and pulled the trigger. Rather, plaintiff claims that the police commander and captains who directed the tactical squad to forcibly enter the house, are liable for creating a situation in which the lawful use of deadly force against Quade was likely to occur. Reconciling this type of claim with the objective reasonableness standard in *Graham* is a difficult task.

It is clear that even with the lawful right to forcibly enter, not every manner of entry which results in a death can be said to be reasonable. If the commanding officer had directed the tactical squad to set fire to Quade's residence in order to flush him out, or had ordered snipers to shoot Quade through the window in order to secure safe entry to the residence, Quade's death caused by such conduct would be actionable under § 1983. However, under these scenarios, the commanding officer

would be liable for actually directing officers in his command to use unjustified and unlawful force. Here, the commanding officers directed the tactical squad to take lawful action, ie. forcible entry of the residence pursuant to a warrant, and the tactical squad used lawful force when confronted by Quade.

The Court is unaware of any case law to support such a theory of liability. Plaintiff relies on *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989). In *Wood* a state trooper arrested the driver of an auto and left the female passenger at the side of the road in a high crime area at night. The plaintiff passenger accepted a ride from a stranger, and was later raped. *Id.* at 586. Plaintiff alleged that the trooper violated her liberty interest in personal security, in violation of the Fourteenth Amendment. The Ninth Circuit reversed summary judgment in favor of the trooper and rejected the trooper's qualified immunity defense. The Court held that plaintiff raised a triable issue of fact as to whether the trooper had been deliberately indifferent to plaintiff's security in the face of reasonably known dangers from third parties.

Borrowing from *Wood*, and using the standard later enunciated in *Graham*, plaintiff argues that the commanding officers unreasonably placed Quade in danger of being subject to deadly force by other police officers, in the face of a known risk that Quade would threaten the officers with a gun. The holding of *Wood* simply cannot be stretched so far. In *Wood*, plaintiff's assailant, the person who used force to cause her injury, had no legal justification for his actions against plaintiff. Plaintiff was the innocent victim of unlawful force. Here, Quade threatened police officers and created the need for

responsive lawful deadly force. *Wood* does not create a duty for police to protect an assailant from a dangerous situation of his own making.

Plaintiff also relies on *Gilmere v. Atlanta*, 774 F.2d 1495 (11th Cir. 1985) (*en banc*). In *Gilmere* police officers used unlawful force when they beat a suspect, and then shot and killed the suspect as he attempted to escape the beating. The Eleventh Circuit held that, even if the suspect's escape attempts threatened the officers, the need to escape was created by the unlawful beating, and thus the shooting was unlawful. *Id.* at 1502. Plaintiff in this case argues that the police created the need for deadly force, and thus cannot justify such use on Quade's actions. The deadly encounter in *Gilmere*, however, resulted from unlawful conduct by the police. Here, the police had used no unlawful force in entering Quade's residence and were then confronted with deadly force from Quade.

Plaintiff argues that it was unconstitutional for the commanding officers to effectuate the lawful entry of Quade's residence without exhausting other possible tactics such as continued negotiation, use of tear gas, or use of police dogs. The commanding officers exercised their discretion in utilizing one of any number of accepted and available practices. In the course of carrying out the police plan, the tactical squad was confronted with deadly force by Quade and lawfully responded with deadly force. Even though it is an unfortunate fact of life that police officers are frequently directed by their commanders to enter situations where the use of deadly force by others must be anticipated, this Court is simply unaware of any law holding that a commanding officer can be liable for the justified use of force by his or her

subordinates in such circumstances. Considering the frequency with which these situations arise, the complete lack of legal discussion regarding liability for a choice in available tactics, is telling. While it is true that such a specific holding is not necessary for a finding that a constitutional right is clearly established, *Anderson*, 107 S. Ct. at 3039, nevertheless, it is also true that the right must still be apparent "in the light of pre-existing law." *Id.*

Given plaintiff's theory for liability and the state of the law regarding such theory, there is no way for this Court to conclude that the alleged "unlawfulness" of the commanding officer's action was "apparent" at the time of the incident. *Anderson*, 107 S. Ct. at 3039. The Court appreciates the difficulties presented by this case and the unfortunate and tragic death of Mr. Quade. Nevertheless, defendants' conduct did not violate clearly established statutory or constitutional rights, *Harlow v. Fitzgerald*, 102 S. Ct. at 2738, and thus defendants are entitled to qualified immunity. In this legal and factual context, at a minimum it is clear that a reasonable police officer could believe that his or her conduct was lawful.

The Court's decision as to the qualified immunity defense will result in summary judgment in favor of the remaining individual defendants. Moreover, where there is no individual liability under § 1983, there can be no municipal liability under *Monell*. Accordingly, the Court will grant defendants' motion for summary judgment as to all claims.

III. CONCLUSION

For the foregoing reasons, the Court ORDERS as follows:

1. Defendants' motion for summary judgment on all claims is GRANTED.

IT IS SO ORDERED.

Dated: September 11, 1992.

/s/ D. Lowell Jensen
D. Lowell Jensen
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JULIA ALEXANDER, As executor of the estate of HENRY O. QUADE, JR., deceased, Plaintiff-Appellant, v. CITY AND COUNTY OF SAN FRANCISCO, FRANK JORDAN, JOHN WILLETT, TIMOTHY HETTRICH, JOAQUIN SANTOS, MATTHEW CASTAGNOLA, DAVID SEID, BERNARD SULLIVAN, RICHARD LEE, DAVID SHINN, JAMES DACHAUER, PATRICK WHITE, JOSEPH KENNEDY, RICHARD HELLER, STEVEN GOUGH, EDWARD ST. ANDRE, NICHOLAS BORTHNE, RICHARD CUNNINGHAM, ALBERT CHINN AND MICHAEL LENNON, Defendants-Appellees.	No. 92-16751 D.C. No. CV-91-02338-DLJ ORDER (Filed Aug. 17, 1994)

Before: FLETCHER, KOZINSKI and TROTT, Circuit Judges

Judges Fletcher and Kozinski have voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Trott has voted to grant the

petition for rehearing and to grant the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

FILED
DEC 8 1994
OFFICE OF THE CLERK

No. 94-876

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL LENNON, ET. AL.,

Petitioners,

vs.

JULIA ALEXANDER, AS EXECUTOR OF THE ESTATE OF HENRY O. QUADE, JR., DECEASED,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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No. 94-876

In The

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October Term, 1994

MICHAEL LENNON, et. al.,

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Respondent.

Opposition To Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Respondent hereby incorporates by reference the Factual Background set forth in the Ninth Circuit's opinion below at 29 F3d 1355, 1357-1359. (Petition A 3-7) In addition, Respondent sets forth additional pertinent facts considered by the Ninth Circuit but not mentioned in Petitioners' Statement Of The Case.

Police were not faced with exigent circumstances prior to entering Mr. Quade's home. (CR 91, Exhibit 6)

At all times during the morning of October 16, 1990, the police could have applied to the Municipal Court for an arrest warrant. (CR 52, Exhibit 8, p. 151)

Police were aware that Mr. Quade had no criminal record of any kind and was in need of professional psychiatric assistance. (ER 6, p. 1;CR 52, Exhibit 6, p. 5, and CR 91,

Exhibit 47, p. 1)

Police were aware prior to entry that Mr. Quade was "half-blind," "mentally unstable," elderly and obese. (ER 4, p. 4; CR 91, Exhibit 9, p. 232)

At no time prior to entering Mr. Quade's home did the police or any other City agency seek or obtain an arrest warrant. (CR 52, Exhibit 8, p. 131)

A Hostage Negotiation Team attempted to contact Mr. Quade by telephone and by means of a bullhorn for approximately 57 minutes. No contact between the Hostage Negotiation Team and Mr. Quade was ever made. (ER 5, p. 1; CR 52, Exhibit 7, p. 1)

While the Hostage Negotiation team was attempting to make contact with Mr. Quade, officers from the Tactical

Squad formulated a plan to enter Mr. Quade's residence in order to arrest Mr. Quade at gunpoint. (ER 3, p. 3; CR 52, Exhibit 1, p. 4)

Members of the tactical unit were trained to shoot to kill if placed in fear for their lives. (ER 4, p. 2; CR 82, Exhibit 9, p. 130)

Police did not attempt to use alternative, less violent ways to take Mr. Quade into custody. (ER 2, p.3; CR 83, p.3)

Less violent alternatives, including waiting to establish communication, the use of a canine unit, and/or the use of tear gas were available to the police on October 16, 1990. (ER 2, p.3; CR 83, p. 3 and CR 91 Exhibit 39, p. 225)

Each of the three alternatives (i.e., waiting to establish

communication, tear gas, canine unit) would have posed less risk of harm to Mr. Quade than breaking down his front door and confronting him with automatic weapons. (ER Exhibit 2, p. 4; CR 83, p. 4 and CR 91, Exhibit 51, p. 221)

As a matter of procedural history, it should be noted that after publication of the Ninth Circuit's opinion in this case, Petitioners moved for a rehearing en banc. Other than Judge Trott, the dissenting judge in the opinion below, not a single judge in the Ninth Circuit requested a vote for rehearing en banc. (Petition D-2)

REASONS WHY THE PETITION SHOULD BE DENIED

A. Neither The Decision Below Nor The Record Raises The Questions Presented In The Petition.

Petitioners advance four questions that they contend are presented by the Ninth Circuit's opinion in this case.

Each of these purported questions has been manufactured through a tortured reading of the opinion below and an absurd interpretation of the factual record. None of Petitioners' proffered questions are presented by the Ninth Circuit's opinion or the record in this case.

Petitioners' First Question asks:

> Are police officers liable under 42 U.S.C. Section 1983 for shooting a person in self-defense, where the liability is premised solely on a claim that the police "created the situation" in which the person tried to shoot them?

Petitioners' first question is inappropriate in at least three respects. First, the opinion below does not purport to impose liability upon the officers who shot Mr. Quade in self-

defense. Rather, it permits a jury to decide whether to impose liability on the commanding officers who unreasonably ordered a Swat Team to storm the house of a mentally ill, elderly, half-blind recluse suspected of having a leaky pipe.

Second, Petitioners' presentation of the excessive force issue before discussion of the Payton v. New York, 445 U.S. 573 (1980) violation reverses both the order of analysis in the opinion below and the chronological order of events at Mr. Quade's house on October 16, 1990. The analysis must start with the Payton violation because the excessive force used against Mr. Quade might well have been avoided had an arrest warrant been properly obtained by the police. As Judge Kozinski correctly observed in his separate concurring opinion below:

I seriously doubt a reasonable judicial officer

would have authorized the immediate storming of Quade's residence by a heavily armed tactical team...[Paragraph]...

Under Payton, the potentially fatal decision to confront a suspect within his own home is taken away from those at the scene, whose judgment may be clouded by an understandable, but perhaps misguided, sense of urgency. What is striking about the fact pattern here is the massive disproportionality of the response to the problem of a leaky sewer pipe. I would like to believe that, had Payton been followed, the judicial officer from whom the warrant was sought would have injected a measure of objectivity and detachment, perhaps saving Quade's life. By failing to take this constitutionally-required step, the officers short-circuited the built-in safeguard of the warrant

requirement, costing Quade his life and exposing themselves to liability. (Alexander v. City And County Of San Francisco 29 F.3d 1355, 1368-1369, Petition A-34).

Third, Petitioners' first question incorrectly assumes the fact that liability is premised solely on the fact that police needlessly created the situation which resulted in Mr. Quade's death. As the Ninth Circuit opinion makes clear, Respondent's claim is that Mr. Quade's Fourth Amendment rights were violated because the police actions that created the situation were themselves unreasonable under all of the circumstances confronting the officers at the scene. Alexander, supra at 1366.

The Ninth Circuit's analysis and ruling on the excessive force claim adheres strictly to the factors enumerated by this Court in Graham v. Connor 490 U.S.

386, 396 (1989). See, Alexander, supra at 2366-1367 (Petition A28-A29) The opinion below does not depart from well established precedent of this Court, and review is unwarranted.

Petitioners' Second Question asks:

> For purposes of qualified immunity, is the law clearly established that police officers may be liable for shooting a person in self-defense, where liability is premised upon police actions taken before the shooting and where every prior appellate decision to consider such liability has rejected it?

As noted above, the police officers who acted in self-defense are not the defendants in this case. As the opinion below correctly held, factual disputes make the instant case

inappropriate for summary judgment both on the merits and on the qualified immunity claim. (Petition A-29) The Ninth Circuit's finding of factual disputes does not raise an issue for review by this Court.

Petitioners' Third Questions asks:

> Where police officers are in the course of executing a forcible entry warrant, does the Fourth Amendment require the officers to stop and obtain an arrest warrant once the officers have determined to arrest the occupant because he threatened to shoot them?

The question as phrased seems to suggest that police faced exigent circumstances that might excuse their lack of an arrest warrant. As the opinion below points out, police did not argue exigent circumstances to the Ninth Circuit because

such a contention is flatly contradicted by the record. Alexander, supra at 1365 note 11. (Petition A-25) Moreover, police did not have to "stop" anything in order to obtain an arrest warrant. The police decision to proceed without an arrest warrant was made during stable conditions without time pressures of any sort.

The opinion below correctly preserves the distinction between administrative inspection warrants and arrest warrants issued upon a traditional showing of criminal probable cause. This distinction goes to the very heart of the protections afforded by the Fourth Amendment, and the Ninth Circuit reached the correct decision in light of this Court's rulings in Payton, supra and Michigan v. Clifford 464 U.S. 287 (1984). The opinion below simply reaffirms the longstanding rule that absent exigent circumstances, police must obtain a criminal arrest warrant in order to enter the home to arrest. There is nothing about this ruling that

justifies review by the Court.

Petitioners' Fourth Question asks:

> For purposes of qualified immunity, is the law clearly established that police officers may not enter a house to arrest an occupant without an arrest warrant, where the occupant threatened to shoot the officers as they prepared to execute a forcible entry warrant?

For purposes of qualified immunity, the real question is whether the law was clearly established that police may enter a home to arrest only if they possess a valid arrest warrant or are confronted with exigent circumstances. This was the holding in Payton, supra and it was clearly established in October of 1990. As noted above, the record in the instant case reveals that there were no exigent

circumstances confronting officers that would have excused their lack of an arrest warrant. Accordingly, if the police entered to arrest Mr. Quade, they committed a classic Payton violation for which they are not entitled to qualified immunity.

B. The Ninth Circuit's Opinion Does Not Conflict With The Decisions Of Other Circuits.

Contrary to Petitioners' assertion that there is a conflict between the instant opinion and the decisions of seven other circuits, a careful reading discloses that the Ninth Circuit's opinion is distinguishable on both law and facts.

None of the cases purported to conflict with the opinion involved an on-going constitutional violation that contributed directly to the excessive force claim. As noted above, had police complied with Payton and obtained an arrest warrant, the excessive force claim may never have

arisen.

Furthermore, the cases cited by Petitioners which involve exigent circumstances have no relevance. The instant case involves no exigent circumstances. Police had unlimited time to determine how to proceed at Mr. Quade's home on October 16, 1990. Therefore, there is no issue as to "split second judgements" made under pressure. See Graham v. Connor, supra at 397 (1989)

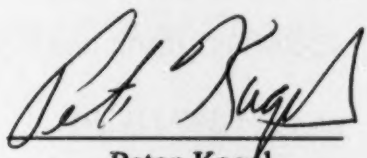
The seizure in the case at bench was inextricably bound up with the command decision to storm Mr. Quade's home with a tactical team. It is impossible to divorce the tragic confrontation between Mr. Quade and the officers who had entered his home from the patently unreasonable command decision to send those officers into Mr. Quade's home in the first place. It forms a part of the totality of circumstances that must be reviewed in an excessive force

claim. Given the unique fact pattern of the instant case, review by this Court is unwarranted.

The Petition should be denied.

Dated: December 6, 1994

Respectfully submitted,



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FILED
DEC 15 1994
OFFICE OF THE CLERK

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No. 94-876

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**On Petition For Writ Of Certiorari
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PETITIONERS' BRIEF IN REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITIONERS' BRIEF IN REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

INTRODUCTION

Respondent Julia Alexander argues that the opinion of the Ninth Circuit does not raise the questions presented in the Petition For Certiorari ("Petition"). Alexander also asserts that the decision does not conflict with the holdings of other circuits. Ironically, Alexander's arguments strengthen the case for certiorari.

ARGUMENT

A. THE NINTH CIRCUIT'S DECISION RAISES THE QUESTION OF EXCESSIVE FORCE PRESENTED IN THE PETITION.

Alexander offers three reasons this case does not raise the first question presented in the Petition.[1] None succeeds.

First, Alexander asserts that the opinion below "does not purport to impose liability upon the officers who shot Quade," but only upon "the commanding officers who unreasonably ordered a Swat team to storm the house. . . . " Respondent's Brief, pp. 6-7. Of course, the ultimate liability in this case is not for "storming" Quade's house, but for *shooting* him. The Ninth Circuit accepts Alexander's theory for that liability, raising the question presented by Petitioners:

> It is important to understand exactly what plaintiff claims. She argues that it was unreasonable for *the officers* to storm the house of a man whom they knew to be a mentally ill, elderly, half-blind recluse who had threatened to shoot anybody who entered. Plaintiff does not argue that once Quade pointed his gun at the officers and pulled the trigger, the officers used unreasonable force in shooting to kill. Rather, plaintiff argues that *defendants used unreasonable force in*

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[1] The first question presented is:

> Are police officers liable under 42 U.S.C. §1983 for shooting a person in self-defense, where the liability is premised solely on a claim that the police "created the situation" in which the person tried to shoot them?

> *creating the situation which caused Quade to take the actions he did. . . .* [¶] *Plaintiff's claim,* if supported by the evidence, *states a classic Fourth Amendment violation* under *Graham v. Connor,* 490 U.S. 386, 397 (1989).

29 F.3d at 1366, Petition, pp. A-27-28 (emphasis added, footnote omitted).

Thus, the theory of liability here is that by "storming" the house, the police led Quade to point a gun at them, resulting in his death. Significantly, in referring to "the officers" who "storm[ed] the house," the opinion does not distinguish between line officers and commanders.[2] The *holding* of the case is that police officers – commanders or troops – may be liable under §1983 for the shooting of a person in self-defense, where the liability is premised on the claim that the officers "created the situation" that led the person to attack them. The question presented is the correctness of this holding.

Critically, Alexander's focus on the command to "storm" Quade's house concedes the central point of the Petition: The Ninth Circuit has permitted liability to be premised upon force used *before the seizure.* But the proper standard is "reasonableness *at the moment*" the seizure occurs. *Greenidge v. Ruffin,* 927 F.2d 789, 791-92 (4th Cir. 1991), *quoting Graham v. Connor,* 490 U.S. 386, 396 (1989) (emphasis added in *Greenidge*). The Ninth Circuit's

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[2] And for good reason. Alexander sued both. While she later dismissed the line officers, the rule of law as to commanders and troops is the same. So is San Francisco's duty to indemnify either kind of officer for liability incurred in the course of their duties. *See* Cal. Gov't. Code §825.

holding here conflicts with *Greenidge* and with decisions from six other Courts of Appeals. *See* Petition, pp. 10-12.

Alexander's second argument is that the Petition ignores the link between the claim of excessive force and the claim of unlawful entry under *Payton v. New York*, 445 U.S. 573 (1980). Respondent's Brief, pp. 7-8. In support, Alexander quotes Judge Kozinski's concurring opinion:

> I would like to believe that, had *Payton* been followed, the judicial officer from whom the warrant was sought would have injected a measure of objectivity and detachment, perhaps saving Quade's life.

29 F.3d at 1369 (Kozinski, J., conc.), Petition, p. A-34.

Significantly, however, the *majority* opinion does not premise the officers' liability for excessive force on the failure to obtain an arrest warrant. Indeed, the majority's theory is quite the opposite. Judge Fletcher suggests that if the officers entered the house intending to *arrest* Quade – the only basis for finding a *Payton* violation – there should be *no* liability for excessive force. 29 F.3d at 1367, Petition, p. A-29.[3]

In addition, the link between the failure to seek an arrest warrant and Quade's death is tenuous at best. Given that Sgt. Heller witnessed Quade threaten the police with a gun, it is inconceivable that a magistrate would have refused to issue a warrant to arrest. The

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[3] Notably, Alexander does not even address Petitioner's argument that by permitting liability to turn on the subjective intent of the police, the opinion conflicts with *Graham v. Connor*. *See* Petition, pp. 12-15.

alleged *Payton* violation is a thin reed on which to rest Alexander's claim of excessive force.

Finally, Alexander says that her claim is not premised on the argument that the police "created the situation" resulting in Quade's death, but rather is premised on the argument that "the police actions that created the situation were *themselves* unreasonable. . . . " Respondent's Brief, p. 9 (emphasis in original). This is sophistry. The opinion says that "a classic Fourth Amendment violation" is stated by a claim that the police "creat[ed] the situation which caused Quade to take the actions he did." 29 F.3d at 1366, Petition, pp. A-27-28 (emphasis added, footnote omitted). Alexander cannot seriously be contending that she is seeking to recover for Quade's having been led to point a gun at police, but not for what happened next.

B. THE NINTH CIRCUIT'S DECISION RAISES THE QUESTION OF UNLAWFUL ENTRY PRESENTED IN THE PETITION.

Alexander asserts that review of the lawfulness of the entry into Quade's house is inappropriate because as framed, the question suggests that the entry was based upon exigent circumstances.[4] Citing footnote 11 of the

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[4] The third question presented is:

> Where police officers are in the course of executing a forcible entry warrant, does the Fourth Amendment require the officers to stop and obtain an arrest warrant once the officers have determined to arrest the occupant because he threatened to shoot them?

Ninth Circuit's opinion, Alexander says that this suggestion is without support. Footnote 11 emphasizes (1) that Captain Hettrich told the press after the shooting that the situation was not "necessarily" dangerous and (2) that the police had set up a perimeter around the house to protect bystanders. 29 F.3d at 1365 n.11, Petition, p. A-25.

Neither of these facts establish legally that a situation is not exigent where a mentally unstable person has threatened "to get his gun and use it" and where the person refuses to respond to police negotiators. In any event, the reasons for review of this issue do not turn upon exigent circumstances. Instead, the reasons turn on (1) the existence of a forcible entry warrant and (2) an officer's having heard Quade threaten to shoot the police. *See* Petition, pp. 17-19. Alexander addresses neither point.[5]

C. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS.

Alexander offers two ways to distinguish the cases from other Courts of Appeals that refuse to hold police officers liable under §1983 for "creating the situation" that leads to a use of deadly force. Neither distinction works.

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[5] Alexander also asserts that the Petition's second and fourth questions are unworthy of review. Respondent's Brief, pp. 10-11, 13-14. Both questions concern claims of qualified immunity. Again, Respondent's Brief fails to confront the reasons Petitioners advance for granting certiorari on these questions. *See* Petition, pp. 16-17, 19-20.

First, Alexander claims that the other cases are different because none "involved an on-going constitutional violation that contributed directly to the excessive force claim." Respondent's Brief, p. 14. As discussed above, however, rather than finding that a *Payton* violation *contributed* to the excessive force claim, the opinion here suggests that the alleged *Payton* violation and the excessive force claim are *mutually exclusive*. *See supra* p. 4.

Second, Alexander argues that the cases from other Courts of Appeals are distinguishable because they involve exigent circumstances. Even assuming *arguendo* that this case involves no such exigency, Alexander cannot distinguish the cases from other circuits so easily. For example, in *Carter v. Buscher*, 973 F.2d 1328 (7th Cir. 1992), the suspect was shot after an intricate plan devised by the police aborted. *See* Petition, p. 10. There was no exigency at the time the plan was devised. Nonetheless, the Seventh Circuit rejected the theory that the police had "provoked a situation whereby unreasonably deadly force was used." 973 F.2d at 1330.[6]

Finally, Alexander contends that "[t]he seizure in the case at bench was inextricably bound up with the command decision to storm Mr. Quade's home with a tactical team." Respondent's Brief, p. 15. Of course, the same could be said of the seizure and the pre-seizure conduct in virtually all of the cases from other circuits cited in the Petition. In *Carter*, for example, the seizure was "inextricably bound up with the command decision" to use a

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[6] In *Carter*, the circumstances were exigent once the plan aborted and the suspect drew a gun on police. The same is true here.

ploy to arrest the suspect. Yet the Seventh Circuit ruled that "[s]hooting [the suspect], then, constitutes the only 'seizure' we must scrutinize under the Fourth Amendment." *Id.* at 1333. The Ninth Circuit's decision here conflicts with *Carter* and the decisions of every other Court of Appeals to face an "Alexander" claim.

CONCLUSION

Alexander concedes that the Ninth Circuit has permitted liability under §1983 for a use of excessive force before any seizure occurs. She also concedes that the opinion below permits a claim of excessive force to turn on the subjective intent of police officers. Alexander's concessions confirm that the Ninth Circuit's decision conflicts with the decisions of other circuits and of this Court.

The issues in this case are important. Left unreviewed, the Ninth Circuit's opinion will open federal courts to a new class of claims and will place police officers facing armed resistance in untenable positions. Certiorari should be granted.

DATED: December 15, 1994

Respectfully submitted,

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